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THE

ALL INDIA REPORTER

1936

BOMBAY SECTION

WITH PARALLEL REFERENCES TO

(1) I. L. R. 60 BOMBAY
(2) 38 BOMBAY LAW REPORTER
(3) 37 CRIMINAL LAW JOURNAL
(4) 159 TO 165 INDIAN CASES
(5) 1936 CRIMINAL CASES

CITATION: A. I. R. 1936 BOMBAY

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V. V. CHITALEY, B.A., LL. B., ADVOCATE,

AT THE ALL INDIA REPORTER OFFICE,

NAGPUR, C. P.

1936

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TO

THE LEGAL PROFESSION

IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

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BOMBAY HIGH COURT
1936

Chief Justices :

The Hon'ble Sir John William Fisher Beaumont, Kt., K.C., M.A. (*Cantab*), Bar-at-law.

" Mr. Sajba Shankar Rangnekar, B.A., LL.B., Bar-at-law.

Puisne Judges :

The Hon'ble Mr. Cecil Patrick Blackwell, M.B.E., B.A. (*Oxon.*), Bar-at-law.

" " Sajba Shankar Rangnekar, B.A., LL.B., Bar-at-law.

" " Robert Stonehouse Broomfield, B.A. (*Cantab.*), I.C.S., Bar-at-law.

" " Kenneth William Barlee, B.A. (*Dublin*), I.C.S., Bar-at-law.

" " Bomanji Jamshedji Wadia, M.A., LL.B., Bar-at-law.

" " Harilal Jaykisandas Kania, B.A., LL.B.

" " Navroji Jahangir Wadia, B.A. (*Bom. & Cantab.*), I.C.S., Bar-at-law.

" " Harsidhbhai Vajubhai Divatia, M.A., LL.B.

" " Albert Sortain Romer Macklin, B.A. (*Oxon.*), I.C.S., J. P.

" " Faiz Badruddin Tyabji, M.A., Bar-at-law, (*Addl.*).

" " Kshitis Chandra Sen, B.A. (*Cal. & Cantab.*), I.C.S. (*Acting*).

" " Keshav Rao Balkrishna Wassoodew, B.A., LL.B. (*Addl.*).

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267	"	"	213	520	"	"	283	796	"	"	389	1101	1936	PC	242	1331	"	"	104
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280	"	"	199	531	"	"	310	818	"	"	372	1111	"	"	96				
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ALL INDIA REPORTER 1936

BOMBAY HIGH COURT

** A. I. R. 1936 Bombay 1

DIVATIA, J.

Ramchandra Doddappa Naik and *another*—Defendants—Appellants.

v.

Hanamnaik Dodnaik Patil and *others*—Plaintiffs—Respondents.

Second Appeal No. 684 of 1931, Decided on 27th June 1935, from the decision of Dist. Judge, Dharwar, in Appeal No. 239 of 1930.

** **Hindu Law—Succession —Dasiputra—Son by Brahmin woman with Shudra male is not dasiputra, and is not entitled to inherit.**

Any relationship between a Shudra male and a Brahmin female, whether it purports to be a relationship by so-called marriage or a state of concubinage, is not recognized by Hindu law; therefore children begotten by such couples are regarded as chandalas and outcastes and are not dasiputras and so they cannot claim any right to a share in the property of their father : 1 *Bom* 97, 1930 *P C* 163, 4 *Bom* 37 (*F B*) and 4 *M H C R* 204, *Ref.* [P 2 C 2, P 3 C 1]

G. R. Madbhavi—for Appellants.

R. A. Jahagirdar—for Respondents.

Judgment. — This appeal has been preferred by the defendants in a suit by the plaintiffs for a declaration that defendant 1, Ramchandra, was neither a legitimate nor an illegitimate son of one Doddappanaik and that he was not entitled to a share in the property of the said Doddappanaik, and for consequential reliefs.

The facts are shortly these : Doddappanaik was admittedly a Shudra. He had two wives, and one woman who was a Brahmin widow, named Gangava, was his mistress and lived in a state of continuous concubinage with him. The plaintiffs are the legitimate son and nephews of Doddappanaik and defendant 1 is found to have been born of Gangava by Doddappanaik. The trial Court found that defendant 1 was an illegitimate son of Doddappanaik and as the latter was a Shudra, his mistress Gangava, though a Brahmin widow, became a Shudra by living with him, and that therefore defendant 1, being born of Shudra parents, was entitled to a share in Doddappanaik's property although he was an illegitimate son, as under the Hindu law, the illegitimate son of a Shudra is entitled as a dasiputra to a share of the inheritance, provided his mother was in the exclusive keeping of his father. That decision has heen reversed by the appellate Court and the learned Judge in appeal has discussed a number of ancient texts as well as authorities on this point and has come to the conclusion that defendant 1 was an illegitimate son of Doddappanaik, but he was not a dasiputra and therefore not entitled to a share in the inheritance, though he can claim maintenance from his father's estate. The ground of his decision is that a son of a Shudra by a Brahmin mistress is not dasiputra, which term is confined only to a son of a Shudra by a Shudra mistress.

The exact point that falls to be decided in this case does not seem to have been the subject-matter of decision by any of the High Courts in India. So far as our High Court is concerned, it has been decided that an anuloma marriage, i.e., a marriage by a person of a higher caste with a woman of a lower caste, is valid and the children of such marriage are legitimate and can claim their share in the property ; but a pratiloma connexion, by way of marriage in the reverse order, i.e., between a woman of any of the regenerate classes with a man of a lower caste, is forbidden under the

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Hindu law and therefore illegal, and that therefore their children are not only illegitimate but cannot claim any share in their father's property, although if the connexion of the parents is continuous, they are entitled to maintenance. That refers to the validity or otherwise of marriages. In the case of illicit connexion outside the relationship of marriage, it has been held that the case of a Shudra father is an exception to the case of other re-generate classes inasmuch as an illegitimate son of a Shudra man by a Shudra woman is entitled not simply to maintenance but also to a share in his father's property. So far the authorities are quite clear. But what would happen if the illicit connexion is between a Shudra man and a Brahmin woman as is the present case? On this point, as I said, there is no express decision although some guidance can be obtained from several ancient texts as well as observations and remarks made in some cases where, although this particular point did not arise for decision, the general connexion between a Shudra male and his mistress is considered. The learned Judge has based his decision on some of these texts. Amongst the several texts which he cites the important ones are a passage from Aushansa Smriti that " one born of the connexion of a Shudra with a Brahmin woman is a chandala, " and a passage from Vishnu Samhita that

> sons born of pratiloma women do not take any share (in their father's property), nor do their sons share in the property of their grandfathers. They are to be maintained by those who inherit the property.

Nilakantha in his Vyavahara Mayukha says that :

> One who is free, by giving himself away, becomes a slave like a wife, so says Brigu. Slavery should be known to exist among three classes : servitude can never exist for a Brahmin.

It is conceded on the authorities that defendant 1 would not be entitled to a share in this property unless he is what in the technical language of Hindu scriptures is called a dasiputra; and the question is what is a dasiputra, and therefore what is a dasi. The contention of the appellants is that dasi means either a slave or any female who lives in a continuous illicit connexion with another person as opposed to merely adulterous or incestuous intercourse. On the other hand, the contention on behalf of the respondents is that the term " dasi " is generally applied only to the case of a Shudra, and dasi therefore means only a Shudra woman, and dasiputra therefore would only mean a son of a Shudra woman. The term " dasi " is generally applied to a low caste woman living in an illegal connexion with another person. There is one reported case of this Court, viz., 14 Bom L R 547 (1) in which, although the point decided was not the exact one which falls to be decided in this case, the general question of relationship of a Shudra man with another woman is considered. There it was held that a Brahmin woman cannot contract a valid marriage with a Shudra because it is a pratiloma connexion, and that such a woman cannot claim maintenance from a Shudra as his kept mistress, unless the connexion is of a continuous character. Now, in considering this question, the learned Judge has, in his judgment, quoted several texts dealing with the relationship of a Shudra man with a Brahmin woman as is the case here. The material text is Yajnavalkya's text No. 93 which says that:

> One begotten on a Brahman woman by a Kshatriya is a suta, by a Vaishya, a vaidehaka, and by a Shudra, a chandal, outcaste to all religion,

and he says that this exclusion from all religion necessarily implies that the connexion of the parents, being sinful, is a prohibited connexion and that the parents become on that account degraded from their respective castes; after a consideration of several other texts he says that the authorities support the conclusion that Yajnavalkya's texts, Nos. 93 and 94, dealing with marriages in the reverse order of castes, refer not to marriages valid in law but to adulterous connexions of the most degraded character and that according to Yajnavalkya a son begotten by a Shudra on a Brahmin woman becomes a chandala, the most degraded of human beings, and therefore "outcaste to all religion." and that is due to the fact that the connexion of the parents is contrary to the Shastras and therefore unlawful.

Thus the view of the Shastras is that any relationship between a Shudra male and a Brahmin female, whether it purports to be a relationship by so-called marriage or a state of concubinage, is

1. Bai Kashi v. Jamnadas, (1912) 14 Bom L R 547=16 I C 133.

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not recognized by Hindu law. If therefore such children are regarded as chandalas and outcastes, it clearly follows that they cannot claim any right to a share in the property of their father. At first sight it may seem strange that the son of a Shudra by a Shudra mistress can inherit to him while his son by a Brahmin mistress cannot, but the origin of this view is to be found in a sense of abhorrence towards any sort of connexion between a Shudra man and a Brahmin woman leading to degeneration of the race, and it is in order to discourage such connexions that the texts expressly enjoin that the children should be regarded as outcastes and therefore not entitled to any share in the property. The trial Judge in this case was impressed by a passage from one of the scriptures, viz., Apastambha Smriti, that

> Brahmins who eat the food of a Shudra for a month will become Shudras for ever in this life and after death they will be born as dogs,

and he therefore thought that a Brahmin mistress by living with a Shudra became a Shudra and that the offspring of such connexion was by a Shudra male with a Shudra female and therefore entitled to a share, but that is not the general trend of the authoritative ancient texts. Such a woman does not become a Shudra but becomes patita, that is to say, a degraded woman, and hence an outcaste. There is a passage in the judgment in 4 B H C R 204 (2) at p. 215 which says that:

> There is authority for holding that the son of a Shudra by a woman of one of the re-generate or superior castes would similarly be excluded from participating in the inheritance of his natural father,

and for this reliance is placed on Daya Bhaga, Chap. 5, Art. 14, Smriti Chandrika (Krishnaswamy Iyer's Translation), pp. 63 and 64, Arts. 11 and 14, and the texts cited and the comments thereon to be found in 3 Colebrooke's Digest, pp. 129, 143, 325 and 326. I might also refer to a recent decision of the Privy Council in 54 Bom 455 (3), where it is observed that the term "dasiputra" no doubt originally meant sons of a female slave, but in Western India, at all events, it has come to mean sons by a kept mistress of one of the lower castes, and for that proposition the cases of 1 Bom 97 (4) and 4 Bom 37 (5) are quoted impliedly with approval. For these reasons I agree with the view of the lower appellate Court that defendant 1 being born of a Shudra male and a Brahmin mistress is not a dasiputra who alone among the class of illegitimate sons would be entitled to a share in the inheritance, and that defendant 1 is not therefore entitled to any share in his father's property. This is the only question arising in this appeal and the decree of the lower appellate Court is therefore confirmed and the appeal dismissed with costs.

B.D. *Appeal dismissed.*

2. Datti Parisi Nayudu v. Datti Bangaru Nayudu, (1869) 4 M H C R 204.
3. Raoji Rupa v. Kunjalal Hiralal, 1930 P C 163 =123 I C 709=57 I A 177=54 Bom 455 (PC).
4. Rahi v. Govind, (1875-77) 1 Bom 97.
5. Sadu v. Baiza, (1879) 4 Bom 37 (FB).

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BARLEE, J.

Dahyabhai Vanmalidas Shah—Defendant—Appellant.

v.

Hiralal Umedram Shah—Plaintiff—Respondent.

Second Appeal No. 627 of 1931, Decided on 24th July 1935, from decision of Asst. Judge, Ahmedabad, in Appeal No. 2 of 1930.

Easement—Projection forming integral part of building—Title can be obtained to column of air below it by adverse possession—Projection not integral part; only easement can be acquired.

If a projection be an integral part of the building to which it is attached so that its removal will injure the building, a title is obtained by adverse possession of twelve years to the column of air below it; in other words, the owner of the land over which it projects has no right to remove it. If, on the other hand, the projection is not an integral part of the building, but is intended for the preservation or safety of the building, e. g., 'pankh' or roof then the person who has made it can obtain an easement only: *Case law referred.* [P 4 C 1]

G. N. Thakor and *P. A. Dhruva*—for Appellant.

I. B. Desai—for Respondent 1.

Barlee, J.—The principal question in this case is whether by the possession of a pankh (a projection) overhanging the property of defendant 1, the plaintiff has obtained title to the column of air below it so that he may resist the defendant's claim to build on his own land, or whether the pankh which has existed for a good many years is a mere easement. The facts which have been stated in the judgments of the lower Courts are that

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there is a joint wall between the plaintiff's and the defendant's properties. On the upper portion of that wall the plaintiff had erected a pankh, or weatherboard, to protect it, many years ago. The learned trial Judge has held that the pankh had been in existence for more than twenty years, and that it was intended for the protection of the side walls of the house, but that the protection will be equally or even more effectively afforded by the defendant's new building, and there will be no irreparable damage to the plaintiff's house if the eaves are removed. In appeal the learned District Judge has taken a different view. Relying on a decision in 27 Bom L R 536 (1) he has held that the projection (which is quite distinct from eaves to discharge rain water) is not a right of easement, but a substantive right. The case he cited is a judgment of Taraporewalla, J. The head-note runs:

> Where a person opens the shutters of his windows and projects weather frames over them for more than twelve years on the land of another he acquires a right to maintain them by adverse possession,

the theory being that the trespasser obtains by adverse possession a right to the column of air below his projection. I have been referred to a number of cases on this point, and it seems to me that they show that if a projection be an integral part of the building to which it is attached so that its removal will injure the building, a title is obtained by adverse possession of twelve years to the column of air below it; in other words, the owner of the land over which it projects has no right to remove it. If, on the other hand, the projection is not an integral part of the building, but is intended for the preservation or safety of the building, then the person who has made it can obtain an easement only. The first case cited is the case of 3 Bom 174 (2), which has been relied on by Taraporewalla, J. It does not decide the question whether the projection created a title or merely an easement inasmuch as it was not necessary to decide it, for the projection has been in existence for more than twenty years. In 28 Bom 428 (3) the question was whether the plaintiff's beams which were overhanging the defendant's soil gave the plaintiff a right to the column of air above them. There Jenkins, C. J., held that the beams gave the plaintiff a right to the space occupied by them, but not the air above or below them and the defendant was entitled to build above them. That was the case of a beam which was an integral part of the building. 27 Bom L R 536 (1) is the case I have already mentioned, and it was held, after the consideration of all the rulings, that the plaintiff having opened his shutters and maintained his weather frames projecting for more than twelve years over the defendant's soil, he had acquired a right thereto by adverse possession,

That was a decision by a single Judge, and in 34 Bom L R 395 (4) a Bench of this Court, of which I was a member, refused to follow it, and Patkar, J., held that we were bound by the decision of the Division Bench in 15 Bom L R 551 (5). That was a case of eaves. Then there is the case of 29 Mad 511 (6). There a man erected a building overhanging the land of another. Finally there are two cases reported in 15 Bom L R. One of them is 15 Bom L R 551 (5) and the other is 15 Bom L R 876 (7). In both cases the question was about eaves. In the first case the decision was that the possession of a pankh or eaves for the discharge of water overhanging the land of another is an easement and not an occupation of that other's property. In the other case the decision was on the same lines. It is clear then that if the projection in this suit is a projection of the nature of eaves, then the plaintiff obtained an easement only. Whereas if it was a projection which cannot be disturbed without endangering his house or entailing fundamental alterations to his house, it gives him a right of ownership. Mr. Desai who has very clearly stated the case for the respondent would distinguish between eaves, whose function is to carry off rain water, and a pankh whose function is to protect the wall. But I do not see any clear difference.

1. Bahadarmal v. Mohanlal, 1925 Bom 335=87 I C 1008=27 Bom L R 536.
2. Mohanlal Jechand v. Amratlal Bechardas, (1878) 3 Bom 174.
3. Ranchod Shamji v. Abdulabhai Mithabhai, (1904) 28 Bom 428=6 Bom L R 356.
4. Chhaganlal v. Hemchand, 1932 Bom 224=138 I C 458=34 Bom L R 395.
5. Chhotalal v. Manilal, (1913) 37 Bom 491=15 Bom L R 551=20 I C 246.
6. Rathinavelu Mudaliar v. Kolandavelu Pillai, (1906) 29 Mad 511=16 M L J 281.
7. Mulia Bhana v. Sundar Dana, 1914 Bom 243 =21 I C 352=38 Bom 1=15 Bom L R 876.

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Both are adjuncts to a wall or to a house for the protection of that house or for the comfort of the occupants. In both cases the position of the eaves or pankh can be altered without endangering the house and both are quite distinct from beams or roofs which have been dealt with in the cases I have mentioned.

Mr. Desai also says that even if it be mere easement, he is entitled to retain it since he has enjoyed it for more than twenty years. The answer to this is that the defendant in building his wall or house must see that the plaintiff is given a pankh or wing, or something similar which will answer the same purpose. Therefore as the learned Subordinate Judge has found that the whole purpose of this projection is to preserve plaintiff's own building, I think he was right in holding that the defendant was entitled to remove it. Accordingly I disagree with the learned District Judge and agree with the learned Subordinate Judge. The result is that this appeal must be allowed with costs. The decree of the lower Court must be amended in accordance with the judgment. The whole suit must, therefore, be dismissed with costs throughout.

B.D. *Appeal allowed.*

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BEAUMONT, C. J. AND N. J. WADIA, J.

Emperor

v.

A. A. Alwe and *others*—Accused.

Criminal Appeal No. 592 of 1934, Decided on 28th August 1935, against order of Chief Presidency Magistrate, Bombay.

(a) Trade Disputes Act (1929), S. 16—Scope.

The class of strike rendered illegal by S. 16 is one, which has objects beyond the furtherance of a particular trade dispute and which is designed or calculated to coerce Government by inflicting severe, general and prolonged hardship upon the community. [P 6 C 1]

(b) Trade Disputes Act (1929), S. 16 (1) (a)—Scope.

Where the strike has objects beyond the furtherance of a trade dispute in a particular trade, the case falls within Sub-S. (a) of S. 16. [P 6 C 2]

*** (c) Trade Disputes Act (1929), S. 16 (1) (b)—"Community" means general public as distinct from persons engaged in trade to which strike relates.**

The word "community" in Sub-S. (1) (b) of S. 16 means the general public as distinct from any section and particularly as distinct from the persons engaged in the particular trade to which the strike relates. [P 6 C 2]

*** (d) Trade Disputes Act (1929), Ss. 16 (1) (a) (b), 17—It is sufficient to prove either design or calculation—No evidence of attempt by accused to induce those engaged in other industries to take part in strike—They cannot be said to have designed to inflict hardship on community within meaning of Sub-S. (1) (b)—Distinction between designed and calculated explained.**

The words "designed" or "calculated" are intended to bear distinct meanings and it is sufficient to prove either design or calculation. [P 6 C 2]

The word "designed" is equivalent to "planned." The design is to be formed by the persons responsible for the strike. The Court has to determine whether the persons responsible for the strike designed or planned to inflict severe, general and prolonged hardship upon the community and thereby to compel the Government to take or abstain from taking any particular action. The Court has to determine what the design of those responsible for the strike was at the time when they instigated it or did the other acts specified in S. 17. [P 7 C 1]

The word "calculated" is directed to the probable consequences which may be expected to flow from the strike, apart from what was in the minds of those responsible. [P 7 C 1]

In order to show that the strike was calculated to have the effect referred to in sub-S. (1) (b), the Court must hold, having regard to the nature of the strike and the circumstances prevailing at the date of the instigation or other acts specified in S. 17 that the natural and probable consequences of the strike will be to inflict such severe, general and prolonged hardship upon the community that either the Government of India or the Local Government may reasonably be expected in consequence thereof to be compelled to take or abstain from taking any particular course of action. [P 7 C 1]

Pecuniary loss occasioned to individuals or industries cannot be said to amount to severe general and prolonged hardship to community, and in absence of any evidence of any attempt on the part of the accused to induce those engaged in other industries to take part in the strike, they cannot be said to have designed or planned to inflict severe and general and prolonged hardships upon the community. [P 7 C 2]

K. McI Kemp and *P. B. Shingne*—for the Crown.

B. R. Ambedkar, S. C. Joshi, N. B. Samarth, A. S. Asyekar, A. G. Kotwal, M. H. Vakil, P. B. Gajendragadkar, K. B. Sukhtankar, Y. B. Rege, R. B. Godambe, P. B. Joshi, K. N. Dharap and *S. G. Patwardhan*—for Accused.

Beaumont, C. J.—This is an appeal by the Government of Bombay against the acquittal of the accused by the Chief Presidency Magistrate. The accused were charged with committing an offence under S. 17, Trade Disputes

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Act of 1929, in that they instigated and declared an illegal strike. The strike in question was a strike of the textile industry throughout the whole of India, and it was declared on 23rd April 1934, as a result of a resolution passed by a body called the All-India Textile Workers' Conference, on 28th January 1934. The conference was called by a body called the Bombay Girni Kamgar Union, in which all the accused were interested. The conference formulated twenty demands, which they proposed and hoped to secure as a result of the strike. The resolution of the conference and the twenty demands are contained in Ex. A. Four of those demands, namely those numbered 3, 17, 19 and 20, were demands of a political character, which could not be granted by Government, or as a result of legislation.

Section 17, Trade Disputes Act provides that:

If any person declares, instigates, or incites others to take part in, or otherwise acts in furtherance of, a strike or lock-out which is illegal under the provisions of S. 16, he shall be punishable

as therein provided:

"Strike" is defined in S. 2, Sub-S. (1), as meaning a cessation of work by a body of persons employed in any trade or industry acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment.

Section 16 defines a strike, which is illegal. A strike is illegal, which, under sub-S. (1) (a)

has any object other than 'the furtherance of a trade dispute within the trade or industry in which the strikers or employers locking out are engaged

and, under sub-S. (1) (b)

is designed or calculated to inflict severe, general and prolonged hardship upon the community and thereby to compel the Government to take or abstain from taking any particular course of action.

The sub-sections are connected by the copulative "and," so that a strike rendered illegal is one which falls within the terms of both sub-sections. The class of strike, therefore, which is rendered illegal, is one, which has objects beyond the furtherance of a particular trade dispute, and which is designed or calculated to coerce Government by inflicting severe, general and prolonged hardship upon the community. The Chief Presidency Magistrate held that, in this case, the conditions of sub-Cl. (a) were complied with, because the strike had objects other than the furtherance of a trade dispute within the textile trade; and, with that decision, I entirely agree. It was argued on behalf of the accused that if the strike had both objects in furtherance of a trade dispute within the particular trade and other objects, the sub-section did not apply. But, in my opinion, that is not the meaning of the sub-section. As the strike in this case had objects beyond the furtherance of the trade dispute in the particular trade, I think that the case fell within sub-S. (1) (a). The real question is whether the strike also fell within sub-S. (1) (b), and that sub-section presents certain difficulties of construction.

In the first place, having regard to the General Clauses Act, I think the "Government" referred to in the section may be either the Government of India or the local Government, and the meaning of the expression "community" must depend on what Government is referred to. If the Government referred to be the Government of India, the "community" must mean the general public in British India. If, on the other hand, the Government referred to is the local Government, then the "community" would mean the general public in the territory over which the local Government exercises sway. Whether it would be sufficient to bring the case within the sub-section to prove that the general public in a particular locality was subjected to severe, general and prolonged hardship, it is not necessary, in this case, to determine. At any rate, "community" must, in my opinion, mean the general public as distinct from any section, and particularly as distinct from the persons engaged in the particular trade to which the strike relates.

The next question, which arises on the construction of the section, is as to the meaning of the words "designed or calculated." That the words were intended to bear distinct meanings, seems to me clear from the fact that sub S. (4) deals only with the word "calculated" and provides that a strike

shall not be deemed to be calculated to compel the Government unless such compulsion might reasonably be expected as a consequence thereof.

As the words are connected by the disjunctive "or," it is sufficient to prove either design or calculation. In my

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opinion, the word "designed" is equivalent to "planned." The section does not say by whom the design is to be formed; but I take it, that it must be by the persons responsible for the strike. I think therefore that the Court has to determine whether the persons responsible for the strike designed or planned to inflict severe, general and prolonged hardship upon the community and thereby to compel the Government to take or abstain from taking any particular course of action. Difficulties may no doubt sometimes arise, because the persons responsible for a strike may not all have the same design or plan. Some of them may design that the strike should have objects which would render it illegal under S. 16, whilst others may be in favour of confining the strike entirely to the furtherance of a particular trade dispute. But, whatever the difficulties may be, the Court has to determine what the design of those responsible for the strike was at the time when they instigated it or did the other acts specified in S. 17. On the other hand, the word "calculated" seems to me to be directed to probable consequences which may be expected to follow from the strike, apart from what was in the minds of those responsible. In order to show that the strike was calculated to have the effect referred to in sub-S. (1) (b), I think the Court must hold, having regard to the nature of the strike and the circumstances prevailing at the date of the instigation or other acts specified in S. 17, that the natural and probable consequences of the strike will be to inflict such severe, general and prolonged hardship upon the community that either the Government of India or the local Government may reasonably be expected in consequence thereof to be compelled to take or abstain from taking any particular course of action.

The Chief Presidency Magistrate held that all the accused, except accused 8, instigated this strike, and I see no reason to differ from him in that finding. But he held that, although the strike fell within sub-S. (1) (a) of S. 16 it was not proved that it was designed or calculated to inflict severe, general and prolonged hardship upon the community as distinct from those engaged in the textile industry; and the question in this appeal really is, whether that part of the decision is right. The Advocate-General relies mainly on the word "designed". His argument is that the accused are intelligent and sincere labour leaders, that the objects of the strike included obtaining political concessions from Government which the accused, if they were really in earnest, must have intended to compel Government to grant, that the only possible means of compulsion would be by the infliction of severe, general and prolonged hardship upon the community, and that we ought to hold therefore that that was the design of the accused. It is true that the accused in their speeches and also in their statements to the Court attached great importance to —what I may call—the political part of their demands, and further expressed the belief that the strike would have serious consequences. Some of the accused, particularly accused 2, 5 and 6, expressed in some of their speeches the hope and belief that other industries would join in the strike. But there is no evidence that any attempt was made to induce other industries to join in the strike. It is true also that one cannot divide the community into water-tight economical departments, and that severe loss suffered by those engaged in the textile trade would be bound to occasion loss, direct or indirect, to persons engaged in other industries. But, pecuniary losses occasioned to individuals or industries cannot be said to amount to severe, general and prolonged hardship to the community. In my opinion, in the absence of any evidence of any attempt to induce those engaged in other industries to take part in the strike, we cannot say that the accused designed or planned to inflict severe, general and prolonged hardship upon the community. They may have thought that, if they could organise a general and prolonged strike in the textile industry, Government would be likely to grant some of their demands in order to save the industry from ruin and in order to avoid loss of revenue. The accused, I think, can hardly have supposed that their more extreme demands would be likely to be granted by Government whatever the result of the strike.

In my view therefore the evidence is not sufficient to show that the accused

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designed to bring compulsion to bear on Government by inflicting upon the community severe, general and prolonged hardship. Nor, in my opinion, can it be said on the evidence that the strike was calculated to produce such a result. The textile industry is not an industry like the transport industry in which one might say, from the nature of the case, that any prolonged stoppage would be bound to occasion severe hardship to the community. There is no evidence at all as to the position which the textile trade occupies in the general economic life of the country. There is no evidence as to what the probable effect of a prolonged stoppage in that trade would be on the price of clothing, or on the price obtainable for cotton grown in India. There is really no evidence which would justify us in holding that a strike in the textile trade, however prolonged, would necessarily or probably cause severe, general and prolonged hardship to the community as opposed to those engaged in the textile trade. That being so I think the decision of the learned Chief Presidency Magistrate was right, and the appeal must be dismissed.

N. J. Wadia, J.—The facts in this appeal are not disputed. All the eight accused were members of the Council of Action appointed at the Conference of All-India Textile Workers, held in Bombay, on 28th January 1934, and of the Joint Strike Committee, which was subsequently appointed. The strike, which began in Bombay on 24th April 1934, was in pursuance of a resolution moved by accused 7 (Nimbkar) and passed by the conference to organise an All-India Textile Strike. Within the first seven days of the strike, 38 out of the 52 mills in Bombay had to be closed, and about 80,000 men employed in the mill industry in Bombay went out. The strike ended on 23rd June. Under S. 16 (1), Trade Disputes Act, 1929, a strike is illegal if it has any object other than the furtherance of a trade dispute within the trade or industry in which the strikers are engaged, and is designed or calculated to inflict severe, general and prolonged hardship upon the community and thereby to compel the Government to take or abstain from taking any particular course of action. It is not denied by the prosecution that in this case there was a genuine trade dispute in the textile industry in Bombay in connection with the wage cut, the rationalisation scheme and unemployment benefits. Sixteen out of the twenty demands put forward by the strikers related to this dispute. With regard to the other four demands, namely, (3) unemployment benefit and maternity insurance at the expense of Government and owners ; (17) right of organisation, speech, assembly, etc. ; (19) trade union legislation and right of trade union organisation within Native States ; and (20) withdrawal of all repressive laws and anti-working class legislation and release of all political prisoners, there can, in my opinion, be no doubt that these demands were not in furtherance of a trade dispute within the textile industry, that is, a dispute between employers and workmen, or between workmen and workmen, which was connected with the employment or non-employment or the terms of employment, or with the conditions of labour, of persons in the textile industry. The question of the grant of unemployment benefits by Government from public funds could not be a matter of dispute between mill-workers and employers, and trade union legislation in the Indian States is a question entirely beyond the control of employers or even of Governments in British India.

It is argued, however, that these four demands were included in the resolution and in the speeches of the accused and in the letter sent to the Home Member, on 9th May 1934, only as part of the general demands of textile workers, and as mere labour propaganda, and were not meant to be regarded as equally important with the other sixteen or as the irreducible minimum. In support of this, we have been referred to the evidence of Mr. Joshi, a member of the Girni Kamgar Union and one of the Joint Secretaries of the Joint Strike Committee, that the Joint Strike Committee was prepared to call off the strike if sixty per cent of the dear food allowance were restored and the trade union recognised by the Millowners Association, and that the twenty demands were merely matter of labour propaganda and many of them had nothing to do with the strike. This statement, however, is not borne out by other evidence.

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In fact, it is contradicted by the speeches and statements made by seven out of the eight accused. From these speeches and statements it is clear that the four demands, which admittedly were not directly connected with any trade dispute, were considered as important as any of the other sixteen, and it was the clear intention of those responsible for the strike that it should not be called off until all the twenty demands were granted. The view of the learned Magistrate, therefore, that these four objects of the strike were not in furtherance of a trade dispute within the textile trade, must be considered as correct.

The next question is, whether the strike was designed or calculated to inflict severe, general and prolonged hardship upon the community as a whole, and thereby to compel Government to take or abstain from taking any particular course of action. The strike lasted two months. Evidence has been led to show that it caused a considerable loss to the mill industry ; but there is no evidence to show that the public as a whole, other than that section of it which was concerned with the mill industry, suffered hardship or inconvenience which could properly be called severe and prolonged. It is argued by the prosecution that the word "designed" in S. 16 means no more than "intended," or "planned," and that the question must be judged not by the actual results of the strike but by what the accused and those who were prime movers in it intended it to produce. I am not prepared to say that the word "designed" in the section means no more than "intended" or "planned". If it did, a strike in some very minor industry, which could not by any possibility cause any serious hardship to anybody outside that particular industry, could be brought within the scope of this section, if the promoters of it, out of some exaggerated notion of their own importance or for purposes of propaganda, announced their intention or hope that the strike would seriously inconvenience the whole community. Where no actual hardship of the nature referred to in the section has been caused, it must, I think, be shown that the nature of the strike or the means which those responsible for it took to start or continue it were such that severe, general and prolonged hardship to the community as a whole must reasonably be expected. In the present case, it seems to me that the evidence is not sufficient to show that such severe, general and prolonged hardship to the community as a whole was either intended, so far as the intentions of the accused can be gathered from their speeches and acts, or was likely in the natural course of things to result. Although some of the accused in their speeches referred to the possibility or desirability of workers in other industries joining the strike, no actual attempt is proved to have been made by any of them, at any time before or during the continuance of the strike, to bring about a sympathetic general strike in other industries, and no such sympathetic strike actually occurred in any industry.

The learned Magistrate has held—and, I think, rightly—that the accused intended the struggle to be a long and severe one and that the strike was calculated to cause severe and prolonged hardship to those concerned in the mill industry. From the fact that the accused had deliberately included the four more or less political demands among their declared objects—demands which they knew could only be obtained from Government and not from the millowners—it must, I think, be presumed that the accused hoped and intended that, as a result of the hardship which the strike would cause to the mill industry, they would be able to force Government to concede some or all of the four demands. But the mere fact that they hoped to bring pressure upon Government in this way, by inflicting hardship upon a very important industry, would not bring their actions within the purview of S. 16 (1) (b). The section requires that the intention must have been to bring pressure upon Government by causing severe, general and prolonged hardship to the community as a whole, not upon some particular section or sections of it. In my opinion, the evidence in this case is not sufficient to show that the strike was designed or calculated to cause hardship to persons other than those concerned in the mill industry. On that view, the strike cannot be considered illegal within the meaning of S. 16.

The acquittal of the accused was

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therefore, correct, and the appeal must fail.

R.M./R.K. *Appeal dismissed.*

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BARLEE AND SEN, JJ.

Waman Ramkrishna Ghotge

v.

Ganpat Mahadeo Nevagi

Cross First Appeals Nos. 193 and 237 of 1929, Decided on 5th July 1935, from decision of First Class Sub-Judge, Ratnagiri, in R. C. S. No. 106 of 1927.

(a) **Practice—Pleadings—Objection as to maintainability of suit should be brought in lower Court—Defendant not objecting to suit in lower Court as suit was not in representative capacity under S. 53, T. P. Act—Defendant deemed to have waived objection and cannot raise such objection in appeal.**

Under O. 8, R. 2, C. P. C., the defendant must raise by his pleading all matters which show that the suit is not maintainable, or that the transactions impeached are either void or voidable in point of law, and where an objection that plaintiff's suit was not maintainable because it is not in a representative capacity as required by S. 53, T. P. Act, was not raised in the lower Court by the defendant, they must be held to have waived their objection on this head in the lower Court. Defendants having waived their right of raising an objection on this head cannot be allowed to do so at the stage of the appeal : 16 *Bom* 1; and 27 *Bom* 146, *Ref.* [P 11 C 2]

(b) **Hindu Law—Partition of joint immovable property is transfer for purposes of S. 53, T. P. Act.**

For purposes of S. 53, T. P. Act, 'partition' where the immovable property has been partitioned among co-owners by metes and bounds, must be held to be transfer: 1916 *Cal* 645 and 1923 *Mad* 577, *Foll.* [P 12 C 1]

G. S. Mulgaonkar—for Plaintiff.

T. N. Walawalkar—for Defendant.

A. A. Adarkar—for Respondent No. 3.

Sen, J.—These are two appeals against the decision of the First Class Subordinate Judge, Ratnagiri, in Regular Civil Suit No. 106 of 1927, in which the plaintiff sued for a declaration that the properties mentioned in the plaint were liable for attachment and sale in execution of the plaintiff's decrees against defendants 5 and 6, and that the farkhat and award referred to in the plaint were fraudulent and therefore liable to be set aside. The facts, in this case, in brief, are as follows: On 5th December 1921, the plaintiff and defendant 5 and one Pandurang Yeshvant Vengurlekar formed a partnership named "Motiram Waman Vengurlekar" as traders and commission agents in Bombay, and while Waman, the plaintiff, subscribed Rs. 5,000 towards the capital, defendant 5 for himself, and defendant 6 for Vengurlekar each passed a promissory note for Rupees 5,000 to plaintiff who advanced Rupees 10,000 towards the capital on those promissory notes. The firm continued to do business until August 1924 when the plaintiff separated from the first, though he continued to remain a creditor of the firm. On 3rd December 1924, the promissory notes of defendants 5 and 6 were renewed. In August 1925, the plaintiff sued defendants 5 and 6 and got decrees in February 1926 against both of them for the amounts due under the promissory notes. He filed darkhasts and got the plaint properties attached. The attachment was however raised on claims having been preferred by defendants 1, 2 and 3 under O. 21, R. 58, contending that defendants Nos. 2 and 3 had separated from the joint family of the defendants by a farkhat dated 8th April 1925, and secondly, that on 29th November 1925 there had been a decree passed on an award by which there had been a partition between defendant 1 on the one hand and defendants 5 and 6 on the other. By that decree defendants 5 and 6 were made responsible for the debts of the firm.

The main reasons of the plaintiff for bringing this suit were that both the farkhat and the award decree were obtained or got passed with the intention of defrauding the creditor, i. e., the plaintiff, and the learned Subordinate Judge has held that this case accordingly falls under S. 53, T. P. Act. The alleged fraud, so far as it is alleged to arise from the award decree, consists in this that defendants 5 and 6 are alleged to have been given less than their legitimate share in the family property, and that these shares, taken together, do not suffice to pay off all the debts for which these two defendants were made liable under the decree. In the arguments advanced by the learned advocates for the two appellants, the following two law points have been raised, viz., (1) that the suit should have been filed by the plaintiff in a representative capacity, as required by S. 53, T. P. Act, and (2) that the partition under the farkhat and the award decree do not amount to a transfer within the meaning of that section. Besides these the following points

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have also been argued, viz. (1) whether as a matter of fact the share of defendants 5 and 6 taken together was sufficient to pay off the debts for which they were made responsible, and also whether the share of each of them would be sufficient to pay the debts which would fall to the share of each; (2) whether defendants Nos. 5 and 6 were given less than their legitimate share, and whether that of defendant 1 was more than his proper share of the family property. A point which has been mentioned but not been pressed in this appeal is whether the debts in question were those of defendants 5 and 6, or whether they were the debts of the whole joint family. Defendants 1, 2 and 3 are the sons of Mahadev who had a quarter share in the family property of the defendants: defendant 5 had a half share and defendant 6 a quarter share in the suit property. Defendants 5 and 6 together therefore have a twelve annas share, and one reason for making them responsible for the family debts would appear to be that they had such a large share in the property.

As regards the point that the suit should have been brought by the plaintiff in a representative capacity, our attention has been drawn to the decision of this Court in 34 Bom L R 862 (1), where it has been held, following the rulings in 16 Bom 1 (2) and 27 Bom 146 (3), that a suit brought by a creditor to set aside a transfer of property under S. 53, T. P. Act, would seem to contravene the interpretation put on that section by this High Court in case the plaintiffs have not brought the action in a representative capacity as representing themselves and all the other creditors of the defendants. To the same effect is the decision of the Calcutta High Court in 34 Cal 999 (4). The Madras High Court, however, appears to have held a contrary view, and it is contended that the learned Subordinate Judge was wrong in relying on the Madras view in preference to the view of this High Court and the Calcutta High Court. It seems to us that there is considerable force in this argument, but it does not appear to us that this point was raised in the pleadings in the lower Court, though a reference to this point is to be found in the judgment of that Court. Under O. 8, R. 2, the defendant must raise by his pleading all matters which show that the suit is not maintainable, or that the transactions impeached are either void or voidable in point of law, and, as this is a point of procedure, the defendants, must be held to have waived their objection on this head in the lower Court; and we do not think that we can make this a ground either for dismissing the suit, or for taking any step to bring all possible parties on the record at this stage. We must hold that the defendants having waived their right of raising an objection on this head cannot be allowed to do so at this stage in the present appeal. As regards the second point, the question is whether a partition in a Hindu family by which the joint family property has been divided by metes and bounds can be held to operate as a transfer within the meaning of S. 53, T. P. Act. That Act defines "transfer" in S. 5 as an act by which a living person conveys property in present or in future to one or more other living persons. We do not find any ruling of this Court specifically on this point. Our attention has been drawn to the judgment in 43 Cal 504 (5) in which his Lordship said (p. 509):

> The object of a suit for partition is to alter the form of enjoyment of joint property by the co-owners; or, as has sometimes been said, partition signifies the surrender of a portion of a joint right in exchange for a similar right from the co-sharer.

This argument has been adopted in a Madras case reported in 44 M L J 513 (6). There a dictum of Spencer, J. in 10 L W 498 (7) to the contrary effect, has been referred to, viz.:

> It (partition) effects a change in the mode of enjoyment of property, but it is not an act of conveying property from one living person to another.

Their Lordships however on the ground that no other authority is to be

1. Shantilal v. Munshilal, 1932 Bom 498=139 I C 820=56 Bom 595=34 Bom L R 862.
2. Burjorji Dorabji Patel v. Dhunbai (1892) 16 Bom 1.
3. Ishvar Timappa v. Devar Venkappa, (1903) 27 Bom 146=5 Bom L R 19.
4. Hakim Lal v. Mooshahar Sahu, (1907) 34 Cal 999=6 C L J 410=11 C W N 889.
5. Atrabannessa Bibi v. Safatullah Mia, 1916 Cal 645=31 I C 189=43 Cal 504=22 C L J 259.
6. Rasa Goundan v. Arunachala Goundan, 1923 Mad 577=72 I C 978=44 M L J 513.
7. Indoji Jithaji v. K. Rama Charlu, 1920 Mad 20=54 I C 146=10 M L W 498.

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found in agreement with the opinion of Spencer, J., adopted the argument in the Calcutta case and held that a partition is a transfer of property within the meaning of S. 53. It seems to us that the line of reasoning on which the view of the Calcutta High Court is based is sound, and that for purposes of S. 53, T. P. Act, 'partition', where the immovable property has been partitioned among co-owners by metes and bounds, must be held to be "transfer." This does not appear to be an unreasonable or far-fetched interpretation: Partition can in fact be adequately described as a mixture of the surrender and the conveyance of rights in property. There can be no doubt that a partition can be effected with as fraudulent an intent as a transfer in the ordinary sense, and we have no sufficient reason to suppose that the mischief sought to be remedied by this section does not include the fraudulent conveyance of rights involved in a fraudulent partition. We would accordingly hold that the partition in this case was a transfer within the meaning of this section. Coming now to questions of fact, the main question that arises in this case is whether the share allotted to defendants 5 and 6 under the award decree was sufficient to pay off the debts for which these two defendants were responsible. It is evident that if their share was sufficient for this purpose, the members of the family could not have intended to defraud or delay their creditors by effecting such partition. It is therefore essential for the plaintiff to prove that the share which went to defendants 5 and 6 was insufficient to pay off these debts. On this point the learned Subordinate Judge, at p. 6, para. 14. of his judgment, has computed the value of the different shares that were allotted to the different defendants. The plaintiff does not appear to have raised any objection to these figures, which were based on the valuations made by the Commissioner appointed in this case. The figures are also accepted by both sides in this Court. According to those figures the value of the property allotted to defendant 5 has been taken as Rs. 28,200.

This, it has been pointed out by Mr. Walavalkar, does not include the value of the ship called 'Sakri'. That value has been estimated by the learned Subordinate Judge at Rs. 1,000 or Rs. 1,200, and we see no reason for not accepting that figure. The value of defendant 5's share thus comes to Rs. 29,200. The value of the share allotted to defendant 6 is estimated by the learned Subordinate Judge at Rs. 13,500. This includes Rs. 1,000 taken as the value of the ship "Satyavati", which was given to defendant 6. Mr. Walavalkar has shown us that the learned Subordinate Judge himself put the value of this ship at Rs. 10,000. We think therefore that the value of his share must be taken at Rs. 9,000 more, i. e., at Rs. 22,500. The two shares together thus come to Rs. 51,700. The secured debt for which the two defendants were made liable come to Rs. 22,900 with interest Rupees 10,000, i. e. in all Rs. 32,900. These do not include the debts which are the subject-matter of this suit amounting to Rs. 10,000. The total debts therefore come to Rs. 42,900. It is therefore evident that the value of the shares of defendants 5 and 6 taken together is more than sufficient to pay off all the debts for which they have been made liable. Next, taking each of these defendants separately, the debts for which defendant 5 can be held responsible would be half the secured debts with interest, i. e., Rs. 16,450 plus Rs. 5,000 due under the decree against him obtained by the plaintiff, i. e., in all he is liable for Rs. 21,450. The value of his share as estimated by us is, it will again be seen, sufficient to pay off these debts. As regards defendant 6 the learned Subordinate Judge has held that there is no reason for the plaintiff to complain about the partition. That being so, it does not seem to us to be necessary to inquire whether defendants 5 and 6 were given less, or others were given more than their respective legal shares. The other point, viz., whether the debts were the debts of defendants 5 and 6, or those of the family, was not pressed, but it is evident that the decrees in question were passed against the two defendants personally and not against the other members of the family. In this view of the case we must hold that the learned Subordinate Judge was not right in holding that the award is liable to be set aside as repugnant to the provisions of S. 53.

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T. P. Act. In the result therefore we allow the Appeal No. 237 of 1929 and dismiss the suit. The plaintiff to pay the costs throughout. Appeal No. 193 of 1929 is dismissed with costs which should be paid to defendant 3.

Barlee, J.—I agree.

As a point of law, which is new to this Court, has been raised, I shall add a few words. A partition is not specifically mentioned in the Transfer of Property Act; but if it be a conveyance, it may come under the definition of "transfer" in S. 5. If a partition in a joint family be carried into effect so that each member acquires a sole interest in a part of the joint family property, I think the transaction amounts to a conveyance. It is certain that each member loses his interest in the property awarded to the other, and it is difficult to see how there can be a loss without a corresponding gain. Partition is certainly a transaction within the mischief of the section. This view was accepted by a Bench of the Madras High Court in 44 M L J 513 (6) which follows a decision in 43 Cal 504 (5). The point decided was that a benamidar cannot maintain a suit for partition of joint immovable property, but the ground of the decision was that a suit for partition of immovable property should be included in the same category as a suit for possession of land, and the learned Judge decided as follows (p. 509):

> The object of a suit for partition is to alter the form of enjoyment of joint property by the co-owners; or, as has sometimes been said, partition signifies the surrender of a portion of a joint right in exchange for a similar right from the co-sharer. Partition is thus the division made between several persons, of joint lands which belong to them as co-proprietors, so that each becomes the sole owner of the part which is allotted to him.

Thus his Lordship puts the case of a partition in the category of exchange, and we accept this view as the correct one. On the facts, I agree with my learned brother that Appeal No. 193 must be dismissed and Appeal No. 237 succeed.

B.D. *Appeal dismissed.*

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BLACKWELL, J.

Harilal Chhaganlal Desai—Plaintiff.

v.

Bai Manjoola and *others*—Defendants.

O. C. J. Suit No. 1517 of 1934. Decided on 13th March 1935.

(a) Will—Construction — Clause in will, providing that interest on particular share of property should be utilized for religious, educational or philanthropic purposes—Bequest held to be vague and invalid.

A clause in a will provided that after making payment to certain persons "as to the one-fourth or one-half share which may remain, my executors shall deposit the same at interest and utilize the interest for religious, educational or philanthropic purposes after me (for the benefit of my soul):"

Held : that the words 'religious, educational or philanthropic purposes' in the clause created conjunctive or cumulative clauses of objects and not conjunctive or cumulative qualifications of each object. That the bequest was vague and uncertain and being a bequest for religious among other purposes, was bad and therefore invalid : *Eades In re* : *Eades* v. *Eades*, (1920) 2 *Ch* 353 and 23 *Bom* 725 (*P C*), *Foll.* [P 14 C 1, 2 ; P 15 C 1]

(b) Costs—Bequest in favour of charity challenged — Advocate-General appearing to support bequest—His costs should be allowed as between attorney and client out of estate.

Where the Advocate-General appears in a suit to support a bequest under a will in favour of charity, his costs should be allowed as between attorney and client out of the estate : *Cardwell, In re* : *Attorney-General* v. *Day*, (1912) 1 *Ch* 779 and 1932 *Bom* 451, *Foll.* [P 15 C 1]

Purshottam Tricumdas and *K. M. Munshi*—for Plaintiff.

J. H. Vakeel—for Defendants 1 to 4.

K. McI Kemp—In person.

Blackwell, J.—This is an originating summons raising questions of construction under the will dated 21st August 1931, of one Jamnadas Chhaganlal, a Hindu, who died at Kapadvanj on or about 19th March 1932. The plaintiffs are the surviving executors. The deceased left a widow Bai Chanchal, who was also appointed an executrix, but who died at Kapadvanj on or about 11th February 1933. Bai Chanchal left two daughters Bai Manjula and Bai Kamla, defendants 1 and 2, who were both born during the lifetime of the testator. Defendant 1, Bai Manjula, has two sons—defendant 3, who was born during the lifetime of the testator and who is now about seven years of age—and defendant 4, who was born after the death of the testator and is now

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about one and a half years of age. Question 9 arises in connexion with Cl. 8 of the will which is in the following terms :

> 8. After payments are made to Behens Manjula and Kamlavati as (stated) above, as to the one-fourth or one-half share which may remain, my executors shall deposit the same at interest and utilize the interest for religious, educational or philanthropic purposes after me (for the benefit of my soul).

The question asks whether the provision in that clause as regards one-fourth or one-half shares in the rents and corpus of the Khetwadi houses for religious, educational or philanthropic purposes is valid and binding in law. The Advocate-General, who appears for defendant 5, namely the Advocate-General of Bombay, submits that this provision is valid and binding. Although the word "or" is used in Cl. 8 of the will, he asks me also to look at Cl. 10 which contains similar provisions to be applied if the houses are sold, the material words there used being "for religious, educational and philanthropic purposes." He submits that although the word used in Cl. 8 is "or," I ought to treat it as if it were "and," that being the word used in Cl. 10. As regards the word "and" in Cl. 10, he points out that the Gujarati word is "tatha," and that that is defined in Mehta and Mehta's Dictionary at p. 716 as "and, also, as well as" when that word is used as a conjunction, and he invites me to treat the word which has been translated "and" in Cl. 10 as meaning "as well as," and to substitute in Cl. 8 for the word "or," which the testator used, the words "as well as." Mr. Vakeel, on the other hand, deprecates my altering the word "or" either to "and" or to "as well as." He points out that Cl. 8 is the first clause, and he submits that it is the dominating clause and that I ought to construe it as it stands. In this connexion, the learned Advocate-General has referred me to (1920) 2 Ch 353 (1). There the words to be construed were "such religious, charitable and philanthropic objects as three named persons should jointly appoint." Sargent, J., in the course of his judgment in that case, said (p. 356) :

> But is this gift confined by the language of the will to objects that are necessarily 'charitable,' in the technical sense of that term? The word 'philanthropic' by itself is undoubtedly too wide, and to render the gift good, one must hold that every object of the gift should, in addition to the qualification of being 'philanthropic,' have the further qualification of being either 'religious' or 'charitable' or both. Now it is plainly inadmissible to read the words as requiring one only of these two further characteristics, that is as denoting objects which, in addition to being philanthropic, are also either religious or charitable. And the only possible constructions are therefore two, the first being one on which all the objects are to be both religious and charitable and philanthropic ; and the second being one on which religious objects, and charitable objects and philanthropic objects are within the area of selection ; but it is not necessary that any single object should have more than one of these three characteristics.

He held that the three epithets there used were epithets creating conjunctive or cumulative classes of objects, and not epithets creating conjunctive or cumulative qualifications for each object. I do not see why I should treat the word "tatha" in Cl. 10 as meaning "as well as" rather than "and" ; and even if I were prepared to read Cl. 8 of the will as if the word there used were "and" and not "or," I should take a similar view of the words in question to that taken by Sargent, J., in the case to which I have just referred, namely that they create conjunctive or cumulative classes of objects, and not conjunctive or cumulative qualifications for each object. I do not however think that I can read the word "or" in Cl. 8 of the will as if it had some other meaning ; and if I am not prepared to do so, I must hold that the bequest is invalid. Mr. Vakeel drew my attention to 23 Bom 725 (2) where the Privy Council agreeing with the decision of the Court of first instance and the Appeal Court in Bombay held that a bequest by Hindu testator of moveable and immovable property to trustees for dharam (that is, for religious purposes) was void upon the ground that the objects which could be considered to be meant by that word were too vague and uncertain for the administration of them to be under any control. Having regard to that decision, and other decisions of the Courts in India to which Mr. Vakeel also referred me, but which I do not think it necessary to mention, I am also of

1. Eades, *In re* : Eades v. Eades, (1920) 2 Ch 353=89 L J Ch 604=123 L T 777.

2. Runchordas v. Parvatibai, (1899) 23 Bom 725=26 I A 71=7 Sar 543 (P C).

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opinion that the bequest being a bequest for religious among other purposes, is bad. Consequently, I answer question 9 by saying that the provision in Cl. 8 of the will referred to in the question is invalid. As regards costs, a point arose as to whether the costs of the Advocate-General could properly be ordered to be paid as between attorney and client in a case like the present, where he appears to support a bequest under a will in favour of charity. He informs me that it has been the practice to allow costs as between attorney and client to the Advocate-General in such cases in the past, and he has referred me to a decision of Mirza, J., in 34 Bom L R 609 (3), where such an order was made. He has also drawn my attention to a note in the English Annual Practice to O. 65, R. 1, in the 1935 Edition, at p. 1417, where it is stated that :

> In proceedings for ascertaining the construction of a testator's will in reference to charitable legacies the Attorney-General is entitled to his costs as between solicitor and client out of the fund (the charitable legacies) : (1912) 1 Ch 779 (4).

I am therefore of opinion that the practice hitherto existing is correct, and I direct that the costs of the Advocate-General should come out of the estate as between attorney and client. I make a similar direction in regard to the costs of the plaintiffs and of defendants 1 to 4. As regards the costs of the plaintiffs, they have appeared by two counsel, but Mr. Munshi very properly, if I may say so, informs me that he does not ask that the costs of two counsel should be allowed. I therefore direct that the costs of one counsel only for the plaintiffs should be allowed.

R.M./R.K. *Order accordingly.*

3. Chinubhai v. Bai Maneckbai, 1932 Bom 451=138 I C 326=34 Bom L R 609.
4. Cardwell *In re* : Attorney General v. Day, (1912) 1 Ch 779=81 L J Ch 443=28 T L R 307=106 L T 753.

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BEAUMONT, C. J. AND N. J. WADIA, J.

Emperor

v.

Mrs. S. D'Cunha.

Criminal Revn. Appln. No. 203 of 1935, Decided on 15th August 1935, against conviction of Addl. Sess. Judge, Poona.

Penal Code (1860), S. 441—Act of trespass done with intention of asserting supposed legal right does not amount to criminal trespass.

Where the act of trespass alleged is done not with intention to commit an offence or to intimidate, insult or annoy any person in possession of property, but is done with the intention of asserting a supposed legal right, it does not amount to criminal trespass within the meaning of S. 441: 26 *Bom* 558, *Disting. Ex parte Mercer, in re Wise* (1886) 17 *Q B D* 290; *Holland In re, Gregg* v. *Holland*, (1902) 2 *Ch* 360, *Rel on* [P 17 C 2]

C. H. Carden Noad, V. N. Chhatrapati, R. F. Bhiladwala and *N. S. Beg*—for Accused.

Jamshed Kanga and *K. N. Koyajee*—for Complainant.

Beaumont, C. J.—This is an application in revision against an order made by the Cantonment Magistrate, First Class, Kirkee, convicting the accused of criminal trespass under S. 448, I. P. C., and directing possession of the house alleged to have been trespassed upon to be returned to the complainant under S. 522, Criminal P. C. The relevant facts are that the complainant got a mortgage decree against accused 1, Mrs. D'Cunha, and in execution of that decree the complainant obtained an order for delivery of possession. The children of Mrs. D'Cunha then raised a claim that the mortgaged property had belonged to their father, and that their mother had no power to mortgage it, and they applied for a stay of execution, and on August 23, 1934, the First Class Subordinate Judge in whose Court the matter was pending granted an order staying execution. That, no doubt, was an order in favour of the children, but if execution was stayed in their favour, the natural result would be that they and their mother would remain in the house. On the same day, namely, August 23, 1934, the bailiff, in execution of the decree for possession, gave possession to the complainant. Later in the day the accused arrived at the house, and it is suggested, were guilty of criminal trespass. Now the actual complaint is that the complainant's men were driven out of the compound, and according to the complainant he then told them to go home as it was raining, and he left Mrs. D'Cunha and her children in the verandah of the house in the evening of August 23, and

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next morning he found that they had not remained in the verandah of the house, but had got inside the house, and that was the criminal trespass complained of. The complaint was lodged on August 24, and it is, I think, unfortunate that the learned Magistrate did not take the view that this was a case in which the complainant was seeking to enforce a civil right by means of the criminal Courts, and that no criminal act was shown. The amount of public time and public money which is wasted in this country by criminal complaints the sole object of which is to try and improve the position of the complainant in civil litigation is really deplorable. However, the learned Magistrate does not seem to have perceived that this was merely an attempt by the complainant to recover possession of the house without going through the procedure which would be necessary in the civil Court, and he convicted the accused of criminal trespass, and made an order for possession under S. 522. The learned Magistrate finds that vacant possession was given to the complainant by the official of the Court, and then he says that from the panchanama it seems that all the doors were closed and locked and the accused got entrance by forcing the door which was bolted from inside. That is the only act of trespass. Then he says:

> I find that this act of the accused of taking law into their own hands by forcibly entering into the bungalow clearly shows their intention of annoying the complainant.

Under the common law of England trespass is not a criminal offence, but it is made a criminal offence by the Penal Code in this country in certain circumstances. Criminal trespass is defined in S. 441 in these terms :

> Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. . . . . . is said to commit 'criminal trespass.'

Now in this case there was nobody actually in occupation of the house at the time of the alleged trespass, and therefore there could not have been any intention to intimidate or insult anybody. But the learned Magistrate finds, in the passage of his judgment which I have read, that there was an intention to annoy. In my judgment, in order to establish a charge of criminal trespass it is essential for the prosecution to prove the intention laid down in the section, in this case, the intention to annoy. Intention must always be gathered from the circumstances of the case, and no doubt one matter which has to be considered is the consequences which naturally flow from the act, because a man is usually presumed to intend the consequences of his own act. But that is only one element from which the Court has to discover the intention of the party who trespasses. Was the real intention to annoy, or was the real intention something else, and the annoyance a mere consequence, possibly foreseen, but not intended or desired ? If it was the latter, I am of opinion that there was no offence under the section.

In the present case, inasmuch as at the time when this trespass was committed the accused had actually obtained an order staying the execution of the order under which the complainant had got possession, it seems to me that the proper inference to draw is that the accused supposed that they had a right to the possession of the property, and intended to assert that right. Whether they were right in their supposition is another matter, but I have no doubt that they honestly believed that they were entitled to possession of the house, and intended to assert their right. As the actual trespass which the learned Magistrate finds proved was merely getting from the verandah into the room of the house, and as the complaint shows that it was raining that night, I think a further intention may well have been to keep dry, rather than to annoy anybody. However, I think the dominant intention was to assert a civil right. Sir Jamshedji Kanga on behalf of the complainant has laid stress upon the ruling of this Court in 26 Bom 558 (1). In that case, the accused, who was executing a decree against his judgment-debtor, entered the judgment-debtor's compound by passing through the complainant's house without his consent and notwithstanding his protest ; and it was held that the accused was guilty of criminal trespass. The case is clearly distinguishable on the facts from the present case, because there was no suggested justification for the act of tres-

1. Emperor v. Lakshman, (1902) 26 Bom 558= 4 Bom L R 280.

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pass, though undoubtedly there was a good deal to be said for the view that the real intention of the accused was to get to the house of the judgment-debtor, and not to annoy the complainant. I do not find myself in agreement with the proposition of law enunciated by Fulton, J., at the conclusion of his judgment and which he says is to be deduced from the English cases to which he refers. The proposition is in these terms (p. 562):

. . . . . although there is no presumption that a person intends what is merely a possible result of his action or a result which though reasonably certain is not known to him to be so, still it must be presumed that when a man voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result.

The last of the English cases cited by Fulton, J., was (1886) 17 Q B D 290 (2), and I think the learned Judge can hardly have read the case. That case arose under the statute 13 Eliz. C. 5, and the question was whether a voluntary settlement had been made with intent to "delay, hinder, or defraud creditors." It was argued that, inasmuch as the result of a voluntary transfer of property must inevitably be to defeat or delay the creditors of the transferor, such an intention must be presumed. Lord Esher, M. R., in a forcible passage of his judgment described the proposition as monstrous. The passage is worth quoting (p. 298) :

The argument was first put in this way : it is necessary to prove that the bankrupt, at the date of the voluntary settlement, intended to defeat and delay a creditor or his creditors generally ; the necessary consequence of what he did was to defeat and delay his creditors ; and therefore as a proposition of law, the tribunal which had to consider whether he did intend to defeat and delay his creditors was bound to find that he did. In support of that proposition dicta of great and eminent Judges were cited. I will venture to say as strongly as I can that to my mind that proposition is monstrous. It is said that it is a necessary inference that a man intends the natural and necessary result of his acts. If you want to find out the intention in a man's mind, of course you cannot look into his mind, but, if circumstances are proved from which you believe that he had a particular intention, you infer as a matter of fact that he had that intention. No doubt, in coming to a particular conclusion as to the intention in a man's mind, you should take into account the necessary result of the acts which he has done. I do not use the words 'necessary result' metaphysically, but in their ordinary business sense, and of course, if there was nothing to the contrary, you would come to the conclusion that the man did intend the necessary result of his acts. But if other circumstances make you believe that the man did not intend to do that which you are asked to find that he did intend, to say that, because that was the necessary result of what he did, you must find, contrary to the other evidence, that he did actually intend to do it, is to ask one to find that to be a fact which one really believes to be untrue in fact.

The case of (1886) 17 Q B D 290 (2) was followed by the English Court of appeal in (1902) 2 Ch 360 (3). In my opinion, the principle enunciated by Lord Esher, M. R., is applicable to the construction of S. 441, I. P. C., if the section is to be construed in the light of the proposition which found favour with Fulton, J., practically every trespass is a criminal trespass, because it can generally be said that in the natural course of events the person on whose property the trespass takes place will be annoyed. That, in my opinion, is not the effect of the section. In the present case I am clearly of opinion that the act of trespass alleged was not done with intent to commit an offence or to intimidate, insult or annoy any person in possession of the property, but was done with the intention of asserting a supposed legal right. The conviction must therefore be set aside, and the fine, if paid, refunded. The order under S. 522, is set aside ; and the possession of the house, if given under that order, must be restored.

N. J. Wadia, J.—I agree.

R.M./R.K. *Conviction set aside.*

2. Ex parte Mercer Wise, *In re*, (1886) 17 Q B D 290=55 L J Q B 558=54 L T 720.

3. Holland, *In re* : Gregg v. Holland, (1902) 2 Ch 360=71 L J Ch 518=86 L T 542=50 W R 575=9 Manson 259=78 T L R 563.

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BEAUMONT, C. J. AND N. J. WADIA, J.

Veherbhai Vallavbhai and *others* — Applicants.

v.

Javer Soma—Opponent.

Civil Revn. No. 35 of 1935, Decided on 9th August 1935, against order of Second Class Sub-Judge, Borsad, in Darkhast No. 1256 of 1934.

Execution—Instalment decree — Default clause—Clause is for creditor's benefit—Enforcement is his option—Decree granting yearly instalments—Entire amount payable any instalment failing—Default — Decree-holder might enforce entire decree—Omission—Right to realise instalments due within 3 years of execution is not lost by omission.

Where a decree provides for payment of decretal amount by instalments and there is also a default clause in the decree, the clause is for benefit of the creditor, who has the option

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to enforce it or not. Where a decree provides for payment by yearly instalments with a provision that in case of failure of any instalment the decree-holder is entitled to realise the entire decretal amount at once and a default is made in the payment of an instalment, the decree-holder might enforce the decree for the whole amount but if he omits to do so, he is not deprived of his right to recover the instalments which become due within 3 years of the filing of the application for execution: 1918 *Bom* 163, *Dissent.*; 1932 *P C* 207, *Rel. on.* [P 19 C 1]

S. R. Parulekar—for Applicants.

Beaumont, C. J.—This is an application in revision under S. 25, Provincial Small Cause Courts Act, asking us to review an order of the Second Class Subordinate Judge at Borsad, dismissing a darkhast proceeding. The case raises a point of law upon which there has been considerable difference of judicial opinion, as noted by the learned Subordinate Judge. The point is a very simple one. There was a decree dated 13th February 1930, providing for payment of the decretal amount by three instalments, in October 1930, October 1931 and October 1932, and there was a provision in the decree that if the defendant failed to pay any one instalment, plaintiffs might recover the whole debt at once by executing the decree. Default was made in the payment of the first instalment, and darkhast proceedings were filed on 2nd October 1934. Admittedly the first instalment is time-barred, but the darkhast is within three years of the due date fixed for payment of the other two instalments, and the question is whether in view of the default clause in the decree all the instalments became payable at the expiration of October 1930, so that the darkhast is time-barred. That was the view adopted by the learned Subordinate Judge. The question as to the effect of a default clause has recently been discussed at length by their Lordships of the Privy Council in 34 Bom L R 1600 (1). That was a case of moneys payable by instalments under a mortgage bond containing a default clause, and it was held that the mortgage bond did not "become due" within the meaning of Art. 132, Lim. Act, until both the mortgagor's right to redeem and the mortgagee's right to enforce his security had accrued. Their Lordships pointed out that the default clause was inserted for the benefit of the mortgagee, that he might or might not take advantage of it, and that it did not lie in the mouth of the mortgagor to insist that the mortgagee must take advantage of the mortgagor's default. The Privy Council overruled various cases in which a contrary view had prevailed.

In the present case, I think, the article of the Limitation Act which applies is Art. 182 (7) which provides that time runs for the execution of a decree or order of any civil Court

where the application is to enforce any payment which the decree or order directs to be made at a certain date,

from such date. In the present case the decree makes the money payable on the three dates specified for payment of the instalments, and those dates are certain. But, as pointed out in 51 All 237 (2), it cannot be said that in a decree of this sort there is any certain date for payment of the whole amount in default of payment of any instalment. There is no certainty that there will be default. In terms, therefore, the relevant article of the Limitation Act is not a bar, and moreover, I think the reasoning of the Privy Council, in the case to which I have just referred, applies with equal force to a default clause in a money decree, such clause being inserted for the benefit of the creditor, and the creditor being free to take advantage of the privilege or not as he thinks best.

The learned Subordinate Judge in a careful judgment considered the ruling of the Privy Council, but came to the conclusion that he was bound by the decision of this Court 20 Bom L R 773 (3), to hold that time ran from the date of the default in payment of the first instalment. That was a decision of Beaman and Heaton, JJ. They differed from the decision in 16 All 371 (4) in which it had been held that under a decree for payment by instalments with a default clause, the occurrence of a default did not make the whole debt payable immediately so that time ran from that date in respect of the whole debt. I must confess that I find the reasoning of

1. Lasa Din v. Gulab Kunwar, 1932 P C 207=138 I C 779=59 I A 376=7 Luck 442=34 Bom L R 1600 (P C).
2. Joti Prasad v. Sri Chand, 1928 All 629=112 I C 73=26 A L J 966=51 All 237 (F B).
3. Raichand v. Dhondo, 1918 Bom 163=47 I C 313=42 Bom 728=20 Bom L R 773.
4. Shankar Prasad v. Jalpa Prasad, (1894) 16 All 371=1894 A W N 115.

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the learned Judges in 20 Bom L R 773 (3) very difficult to follow. The Judges seem to take the view that a creditor who gets a decree for payment by instalments is really entitled to a decree for immediate payment, that the privilege of payment by instalments is inserted entirely for the benefit of, and out of sympathy for, the debtor, and that if the debtor fails to take advantage of the privilege accrued to him, then the creditor has a decree for immediate payment of the full amount. It is difficult to see why, if a creditor is entitled to a decree for immediate payment, he should only get a decree for payment by instalments. I think the correct view is that the debtor must be treated in such cases as entitled to a decree for payment by instalments, and that the clause making the whole amount payable on default in payment of any instalment is inserted for the benefit of the creditor, who has an option to enforce the clause or not. It is to be observed that the learned Judges in 20 Bom L R 773 (3) do not refer to any of the articles of the Limitation Act, and do not mention the article under which they held that the darkhast proceedings were barred. In my opinion it is quite impossible to reconcile the reasoning in 20 Bom L R 773 (3) with the reasoning of the Privy Council in 34 Bom L R 1600 (1), and I think we must follow the latter reasoning.

In my opinion, therefore, we ought to hold that the fact that default occurred in the payment of an instalment and that the creditor might thereupon have enforced the decree for the whole amount is irrelevant since he did not in fact attempt to do so, and his omission to do so has not deprived him of the right to recover the instalments which became due within the three years before the filing of the darkhast. The application must be allowed with costs throughout. Rule made absolute with costs throughout. Darkhast to proceed.

N. J. Wadia, J.—The decree in this case expressly made it optional on the decree-holder to recover the whole amount at once on default of payment of any one instalment. The view taken in 20 Bom L R 773 (3) which the learned Subordinate Judge felt himself bound to follow, was that such provision in an instalment decree made it obligatory on the decree-holder to proceed to realize the whole amount at once on the occurrence of a default, and that on his failure to do so, his right to execute the decree would become time-barred after three years from the date of the first default. The learned Subordinate Judge took the view that the decision in 20 Bom L R 773 (3) was not overruled even by implication by the decision of the Privy Council in 34 Bom L R 1600 (1). It seems to me that he is wrong in this view. It is true that 34 Bom L R 1600 (1) was a case dealing with a mortgage bond. But the principle which was there laid down that a proviso of this nature (i. e., a proviso giving the mortgagee an option to realize the entire amount of the debt on the occurrence of a default in payment of any one instalment) was inserted for the benefit of the mortgagee, must, in my opinion, necessarily apply also in the case of an instalment decree. And there is no reason why the judgment-debtor should be enabled as a result of his own default in the payment of one instalment, to deprive the decree-holder of the right to recover subsequent instalments which may become due. The terms of Art. 182, Cl. (7), Lim. Act, do not appear to me to debar such a right. The right is one which accrues to him on the date of each instalment, and I see no reason why the fact that he has waived his right to recover the first instalment should debar him from exercising a right which the decree expressly gives him to recover subsequent instalments. I agree, therefore, that the application should be allowed with costs.

S.R. *Rule made absolute.*

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BROOMFIELD AND MACKLIN, JJ.

Secy. of State—Appellant.

v.

Yadavgir Dharamgir—Respondent.

First Appeal No. 109 of 1933, Decided on 18th July 1935, from decision of joint First Class Sub-Judge, Jalgaon, in suit No. 84 of 1932.

(a) Contract—Validity—Secretary of State.

In order to bind the Secretary of State by a contract there must be a deed executed on his behalf and in his name by the proper authority : 1934 *Bom* 277 and 29 *Bom* 580, *Foll.* [P 21 C 1]

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(b) Appeal—New point should not be allowed in appeal — Position of Secretary of State is not different.

A Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit. The Secretary of State has no special privilege in this respect : 33 *Bom* 35, *Foll.* [P 21 C 1]

(c) Master and Servant—Generally Government servant can be dismissed at pleasure excepting statutory exception—Dismissal does not ordinarily give rise to action for damages.

The general rule is that Government servant holds office during pleasure and is liable to be dismissed at any time without notice and without reason assigned. The rule may be subject to exceptions but they must be statutory exceptions, and in this country apparently they must be contained in rules made under the Government of India Act, for instance, the fundamental rules governing the employment of civil servants. Further, it is for the plaintiff, who claims damages for breach of contract, to prove such statutory exceptions; if the general rule applies, then dismissal cannot give rise to an action for damages : 27 *Bom* 189; 33 *Cal* 669 ; *Denning* v. *Secy. of State*, (1920) 37 *T. L. R.* 138 ; 1930 *Cal* 404 and *Shenton* v. *Smith* (1895) *A. C.* 229, *Foll.* [P 21 C 2 ; P 22 C 1]

K. Mcl. Kemp and *R. J. Kolah* — for Appellant.

K. N. Dharap—for Respondent.

Broomfield, J. — This is an appeal from a judgment of the First Class Subordinate Judge of Jalgaon, awarding the plaintiff Rs. 3,915 damages for breach of contract. The plaintiff was an employee of the G. I. P. Railway, which is a State-owned railway represented by the defendant, the Secretary of State. He was a passenger-brakesman employed at Bhusawal. It appears that in February 1930, there was a general strike of the Railway employees which the plaintiff joined. There were negotiations between the All-India Railwaymen's Federation on behalf of the employees and the Railway Board. Certain terms of the settlement of the dispute were offered by the Member of Commerce and Industries and they were accepted by the Federation. These terms were issued in the form of a communiqne by the Government of India and they were briefly embodied in a notice which was published by the Agent of the G. I. P. Railway. There is no dispute now as to the terms. They were :

Strikers who present themselves for duty on or before 15th March 1930, and who have not been discharged for reasons other than going on strike, will be re-instated in their former posts if they have not been permanently filled, or in some other suitable vacancy, if available. Strikers presenting themselves for duty on or before 15th March 1930, who cannot be taken on immediately because their posts have been permanently filled, or because no other suitable vacancy is available, will have their names registered and will be offered employment on the G. I. P., E. I. or N. W. Railways as posts become available.

The plaintiff alleged in his plaint that this agreement was broken as he was not re-employed in accordance with the terms offered and he claimed damages on the footing that he was entitled under the rules governing railway servants to be re-employed till he reaches the age of 55, that is, fo eleven more years, and to draw pay and gratuity accordingly. It is an admitted fact that the plaintiff was not re-employed. The defendant alleged in his written statement that the plaintiff had not complied with the terms of the offer made to the strikers and had not applied to be re-instated in time. That point was found in plaintiff's favour by the trial Court and is not now contested. It was also alleged in the written statement that the plaintiff had been discharged before the agreement was arrived at. But this fact has not been proved, and as I have said, the trial Court awarded the plaintiff Rs. 3,915 damages, with future interest, calculated on the amount he would have earned if he had been employed for a period of five years from 14th February 1930.

In this appeal by the Secretary of State the learned Advocate General on behalf of the appellant has taken three points : (1) that there was no contract enforceable against the Secretary of State upon which the plaintiff could sue ; (2) that, assuming there was such a contract, the plaintiff would be entitled to no damages, because the Secretary of State could dismiss the plaintiff like any other Government servant at his pleasure without notice ; (3) that in any case the damages have been wrongly assessed. The first point is based upon S. 30, Government of India Act, which provides that contracts which are to bind the Secretary of State must be executed on his behalf and in his name and by such person and in such manner as the Governor-General-in-Council directs or authorises. From the language of this section and from the authorities 36 Bom L R 568 (1) and 29 Bom 580 (2), it is clear that

1. Municipal Corporation of Bombay v. Secy. of State, 1934 Bom 277=152 I C 947=58 Bom 660=36 Bom L R 568.
2. Municipal Corporation of Bombay v. Secy. of State, (1905) 29 Bom 580=7 Bom L R 27.

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in order to bind the Secretary of State by a contract there must be a deed executed on his behalf and in his name by the proper authority. In the present case no such deed has been produced nor referred to. This, in my opinion, is a good point though a technical one. But the point does not arise upon the pleadings. It was not taken in the written statement nor raised in any way at the hearing of the suit. It has been held that a Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit : 33 Bom 35 (3), I do not think that the Secretary of State has any special privilege in this respect and that being so, we do not propose to consider this preliminary objection. As it happens it is not essential for the determination of this case.

The learned Advocate-General has referred us to a number of authorities in support of the proposition that the Secretary of State as representing the Crown is entitled to dismiss his servants without notice. In 33 Cal 669 (4) it was held that the Crown has power to dismiss its servants at will and also that no authority representing the Crown is able in the employment of persons in the service of the Crown to contract with them so as to deprive the Crown of the enjoyment of that power, which can only be excluded or restricted by an Act of the Legislature. The case of (1896) A C 575 (5) was distinguished, because in that case there were certain provisions of the New South Wales Civil Service Act passed for the protection of civil servants and it was held that the provisions of this Act constituted an exception to the general rule that the Crown can dismiss at pleasure. Then in 37 T L R 138 (6) it was held that a Crown servant may be dismissed at will without notice even if there be an agreement for a term certain, subject to dismissal for misconduct and with a provision for renewal at the end of the term. In 57 Cal 231 (7) where an action for damages for wrongful dismissal was brought by the plaintiff who was a head clerk under the Trustees of the Indian Museum, it was argued on his behalf that he was practically in the same position as a Government servant. The Court held that he was not a Government servant. It also held, however, that that would have made no difference, because Government servants are liable to be dismissed at pleasure, notwithstanding the provisions of Section 96 (B), Government of India Act. Costello, J., held that the right of dismissal is only limited in so far as there are definite and special rules or regulations laying down the method by which or the circumstances in which that right is to be exercised. Then in another English case, (1895) A C 229 (8), it was held that the general rule, viz., that a Government servant can be dismissed at the pleasure of the Crown or Government will apply unless the plaintiff can point to some statutory exception. That was an action brought by a medical officer in the service of the Government of Western Australia. There were certain regulations which dealt with matters of suspension and dismissal, but it was held that these did not constitute a contract between the Crown and its servants. Similarly, in 27 Bom 189 (9) it was held by Tyabji, J., that public servants hold their offices at the pleasure of the Sovereign and are liable to dismissal at his will and pleasure, if the power of dismissal is not limited by statutory provision. There are certain observations in Tyabji, J.'s judgment which are relied upon by the learned advocate for the plaintiff. I shall deal with these a little later.

There can be no doubt as to the effect of the cases to which I have referred. The general rule is that a Government servant holds office during pleasure and is liable to be dismissed at any time without notice and without reason assigned. The rule may be subject to exceptions but they must be statutory exceptions, and in this country apparently they must be contained in rules made under the Government of India Act, for instance, the fundamental rules govern-

3. Nathu Piraji v. Umedmal Gadumal, (1909) 33 Bom 35=1 I C 456.
4. A. E. Voss v. Secy. of State, (1906) 33 Cal 669.
5. Gould v. Stuart, (1896) A C 575=65 L J P C 82=75 L T 110.
6. Denning v. Secy. of State, (1920) 37 T L R 138.
7. Bimalcharan Batabyal v. Trustees for the Indian Museum, 1930 Cal 404=125 I C 647=57 Cal 231.
8. Shenton v. Smith, (1895) A C 229=64 L J P C 119=43 W R 637=72 L T 130.
9. Jehangir M. Cursetji v. Secy. of State, (1902) 27 Bom 189=5 Bom L R 30.

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ing the employment of civil servants. Further, it is for the plaintiff, who claims damages for breach of contract, to prove such statutory exceptions. It also appears from these cases that if the general rule applies, then dismissal cannot give rise to an action for damages. The learned advocate for the plaintiff has not in any way contested the principle laid down in these authorities. He has argued, firstly, that the cases cited are cases of wrongful dismissal, and his client he says, is not claiming damages for wrongful dismissal but for breach of the contract of re-employment. In my opinion, however, the case cannot be distinguished in principle from the one which would have arisen if the plaintiff had been dismissed on the date when he says he should have been re-employed. In fact legally the action for wrongful dismissal is an action for breach of the contract to employ.

The second point which has been more seriously argued is based on the observations of Tyabji, J., in 27 Bom 189 (9) which are contained at pp. 212 and 213 of the report of that case. After referring to a number of English authorities the learned Judge said (p. 213):

> In all these cases it was broadly laid down that you cannot limit the power of the Crown to dismiss its officers at pleasure. I must qualify this proposition to this extent, that the power of the Crown to dismiss its public officers is necessarily limited by any statutory provision that may have been enacted for the benefit of such public servants, and it may not have application to such of the servants of Government as are not charged with functions which are in themselves the acts or the attributes of sovereignty. As the Secretary of State in Council is now liable to the same extent as the East India Company was, it seems to me to be extremely probable that the Secretary of State would be bound by his contracts with private individuals, where those individuals are not employed in carrying on those departments, which are essentially sovereign in their character.

Then he cites a passage from "Ilbert's Government of India" in which the author expresses a doubt as to whether and how far the principles laid down in (1895) A C 229 (8) and (1896) 1 Q B 116 (10), would apply to contracts with such persons as, amongst others, mechanics and artificers in railway service. Mr. Dharap has relied on the distinction there drawn and he contends that his client being merely a passenger-brakesman was not performing duties which have anything to do with the functions of Government at all. He also relies on Tyabji, J's. expression of opinion to be found elsewhere in his judgment, that dismissal of a public servant by the Crown is an act of State and therefore outside the jurisdiction of the Courts. In my opinion there is nothing in these points.

The distinction which Tyabji, J., seeks to draw between the employees of departments which are "sovereign" in their character and employees in other departments is, I think, not maintainable in view of the other cases to which I have referred. In 33 Cal 669 (4) the plaintiff was merely a clerk in the Foreign office of the Government of India. In (1896) A C 575 (5) also the plaintiff was a clerk in the civil service. In (1895) A C 229 (8) the plaintiff was a medical officer in the service of the Government of Western Australia. In none of these cases was the particular point urged by Mr. Dharap raised or considered. But it is difficult to see how it could have been suggested that the plaintiffs in those cases were performing functions "essentially sovereign in character", and the distinction now suggested must, I think, be said to be impliedly negatived. I may note that Tyabji, J.'s observations on which reliance is placed are *obiter dicta*. The plaintiff there was Huzur Deputy Collector and there was no dispute that he exercised function which partook of the character of sovereignty. Apart from the fact that the distinction sought to be made is inconsistent with the cases, I am of opinion that it would be unworkable. Opinions as to the proper functions of Government are continually fluctuating; if any such principle were to be applied it would be very difficult for the Courts to decide whether in a particular case a Government servant could or could not be dismissed. Further, the learned Advocate-General has pointed out that these observations of Tyabji, J., seem to have been partly based on an alleged distinction between the Crown as representing the East India Company and the Crown in its ordinary capacity.

But in 37 T L R 138 (6), there is a discussion of the relevant statutes which seems to indicate that no such distinction could properly be made. As to the suggestion that the ratio decidendi in the

10. Dunn v. The Queen (1896) 1 Q B 116.

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cases is that a dismissal of a Government servant is an act of State, Mr. Dharap has to admit that the leading cases by which the general rule as to the Crown's power has been established show no trace of any such doctrine. A further argument on behalf of the plaintiff was that as he had never actually been dismissed and as he has all along been willing to work, he is entitled to the pay as if he had worked. I can hardly think that this contention could have been seriously put forward. In any case I think it requires no serious consideration. It is an indisputable fact that the plaintiff was not re-employed in spite of the offer made to the strikers. If he has any cause of action at all, it can only be by reason of the breach of this argeement. In view of the cases which have been cited before us, I think it must be held that as the plaintiff was liable to be dismissed at pleasure, he has no claim to any damages whether he was dismissed or whether his application for re-employment was refused. That being so, the question of damages is somewhat academic. The learned trial Judge has treated it as though it were a case of a contract to re-employ the plaintiff for a fixed term, i. e., up to the age of 55; but obviously it is not a case of that kind at all. The employment was before, and would have been again, had the plaintiff been re-employed, employment at the pleasure of Government.

It seems that the case was not very skilfully placed before the learned trial Judge and he got little assistance from the bar. But even on the materials before him he was not justified in assessing the damages as he did. It was the plaintiff's duty to prove the terms of his employment. If he alleged that it was for a fixed term or subject to notice it was for him to establish that. The learned trial Judge was apparently of opinion that it was for the defendant to show that the service was terminable to notice, and if so, by what notice. There was on the record a statement elicited in the cross-examination of one of the defendant's witnesses to the effect that the services of Railway employees may be terminated by one month's notice. That evidence was not rebutted by the plaintiff. On that footing the only damages to which the plaintiff could be entitled, assuming that he was entitled to any damages at all, would be damages for the period of notice of one month. Moreover, even on the assumption that this was a case of a contract for the re-employment of the plaintiff till he reached the age of 55 (which is what the trial Judge has assumed), he has not applied the right principles. It is not a case of first impression as he seems to have thought. Many authorities may be found in the text books. I need only refer to Halsbury, Vol. 20, paras. 216 and 218; Mayne on Damages, p. 252; and Odgers' Common Law, Vol. 2, p. 681. It is not necessary to pursue this matter further because, as I say, in the circumstances of this case it is clear that the plaintiff is not entitled to damages at all.

The appeal therefore must be allowed and the plaintiff's suit fails and must be dismissed. We have felt some difficulty on the question of costs. It is undoubtedly in some ways a hard case. The plaintiff was allowed in the lower Court to sue in forma pauperis. The result of the appeal is that he gets nothing. The defendant has succeeded on defences which are in a sense technical defences, it being now an admitted fact that the plaintiff was not re-employed although he complied with the terms of a formal offer of re-employment. Moreover, as I have said, the case for the defendant was badly put in the lower Court. Had it been properly put there, it is doubtful whether this litigation would ever have come to this Court at all. In the circumstances we direct that the parties should pay their own costs in both Courts.

Macklin, J.—I agree. The first point taken by the learned Advocate-General was that the agreement (if any) between the plaintiff on the one hand and the defendant on the other was not binding on the defendant by virtue of S. 30, Government of India Act, because it was not in the proper form and was not executed in the name of the Secy. of State. I do not think that it is necessary or even proper for us to consider this aspect of the question in appeal, since the point was not taken in the written statement of the defendant at the trial, though under the provisions of O. 8, R. 2, Civil P. C., it certainly ought to have been taken. It was suggested by the learned advocate for the plaintiff that if this point had been properly taken at the proper time, it might have been possible for him to produce evidence establishing the existence of a valid contract by which the defendant

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would be bound. To me it seems that this is not very probable. But I do not think it necessary to discuss the question further, because in my opinion the point, for reasons already stated, ought to fail. The next contention which the learned Advocate-General has argued is more serious for the plaintiff. It is that the plaintiff is not entitled to damages at all; and reliance is placed upon the theory that the Crown can dismiss its servants at pleasure and without notice unless the power of dismissal has been limited by some statutory provision. In support of this contention reliance has been placed upon a number of cases 27 Bom 189 (9) ; 33 Cal 669 (4) ; 37 T L R 138 (6) ; 57 Cal 231 (7) and 1895 A C 229 (8). These cases fully support the existence of a right of the Crown as contended, and it appears, on these authorities, that it was for the plaintiff to point to some statutory provision by which the Crown was not entitled to dismiss him at pleasure and without notice.

This position is not contested by the plaintiff's learned advocate. He does, however, rely on two arguments to show that the theory has no application in the present case. His first contention is that the privilege of the Crown to dismiss its servants at will and without notice is based upon the wider theory that the act of dismissal is an act of State and that acts of State are exempt from the jurisdiction of the Courts; and he urges that the dismissal of a servant whose duties are in no way duties of State is not an act of State. In the case of 27 Bom 189 (9) this aspect of the question was touched upon by the learned Judge who decided it. But the discussion was not strictly necessary for the decision of the case and the observations in that respect are in the nature of obiter dicta. Moreover, the learned Judge did not say definitely that the right of dismissal by the Crown would apply only to those of its servants whose employment was concerned with what may be called sovereign duties, though his opinion was inclined in that direction. In the rest of the authorities there is nothing from which it can be inferred that the right of the Crown depends upon its being an act of State to dismiss its servants, and I do not think that there is in law any valid distinction between the Crown's dismissal of one of its servants whose duties are concerned with sovereign acts and its dismissal of another servant whose duties are not concerned with sovereign acts.

The next argument against the right of the Crown to dismiss in this case is by reference to the plaint, which discloses a suit not so much for damages for wrongful dismissal as for damages for a breach of contract of employment or re-employment. It was argued on the evidence of the case that the plaintiff had never really been dismissed, because any dismissal that may be inferred from the fact of his vacancy having been filled up was due to the action of the Station Master of Bhusawal, who had no authority to dismiss. The situation, then, is that what the plaintiff is really suing for is the pay which he would have earned. In my opinion there is no real distinction between this suit regarded as a suit for wrongful dismissal and a suit regarded as a suit for breach of contract of employment. It is a distinction without a difference, and the effect of either form of suit would be exactly the same. The plaintiff in short was liable to dismissal at the hands of the defendant without notice, and on that account he is not liable to damages at all. That being so, I do not think that it is necessary for me to discuss the last point raised on behalf of the appellant, viz., that damages have been assessed by the trial Court upon a wrong principle. I agree that the appeal must be allowed and the plaintiff's suit be dismissed. In the circumstances of the case I think it fair that the parties should pay their own costs throughout.

B.D. *Appeal allowed.*

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B. J. WADIA, J.

In re, the Peninsular Life Assurance Co. Ltd.

I. C. No. 26 of 1934, Decided on 23rd August 1935.

(a) Companies Act (1913), Ss. 184, 38—Court can decide question relating to title of aggrieved person to have his name omitted from register of share-holder and to decide question necessary for its rectification—Exercise of jurisdiction is discretionary.

Section 184, incorporates S. 38. On an application under that section the Court has power to decide any question relating to the title of the aggrieved person to have his name omitted

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from the register of share-holders and generally to decide any question necessary or expedient to be decided for the rectification of the register. The exercise of the jurisdiction given by the section is discretionary, having regard to the person who is the applicant before the Court and to all the facts and circumstances of the case. [P 26 C 1]

(b) Companies Act (1913), Ss. 31, 156—Company or liquidator is not concerned with person advancing consideration for shares—Person entered as owner of share is the contributory liable in respect thereof.

The company or the liquidator where the company has gone in liquidation, is not concerned with the persons paying the consideration for the shares of the company but the person who signed the transfer form as the purchaser and whose name is entered as owner of the shares in the share register with his knowledge and consent, is the contributory who is liable in respect thereof. [P 26 C 2]

(c) Companies Act (1913), Ss. 34, 156—Person transferring share remains liable until transferee's name is entered into register.

A person who executes a transfer form of shares in a company remains liable unless and until there is on the list a transferee who is legally liable to the company. Until the transferee's name is entered in the register, the dividends on the shares are also payable to the transferor, for he is deemed to be the holder of the shares until the entry is made. [P 27 C 1]

(d) Companies Act (1913), S. 34—Meeting of directors for confirming transfer of shares —Irregularity in meeting for want of due notice does not invalidate transfer.

An irregularity in a meeting of directors for want of notice to all the directors, for confirming a transfer of shares does not invalidate a transfer duly made. It is sufficient if at the date of winding up there is upon the register a transferee who is legally liable to the company in respect of these shares. *Symon's Case*, (1870) 5 *Ch A* 298, *Rel. on.* [P 28 C 2]

(e) Company—Meeting of directors—Meeting of board of directors—In default of due notice to directors meeting is prima facie irregular—Court cannot assume that notice was not given because there is nothing on record to show that it was not given—Party concerned must prove that notice was not in fact given to absent directors—Court can generally assume that everything is done regularly.

To convene a meeting of the board of directors of a company, prima facie due notice of the meeting must be given to all the directors and in default of such notice the notice is irregular. No notice may be necessary if the absent directors had knowledge of the meeting otherwise. But from the mere fact that there is nothing on record to show that notice was not given the Court cannot assume that the notice was not given merely because there is an entry in the register of directors that a particular director has ceased to be a director. It is for the party alleging that the meeting was irregular to prove to the satisfaction of the Court that notice was not in fact given to the absent directors. Generally the Court is entitled to assume that everything has been done regularly and in due course in absence of evidence to contrary : *In re Portuguese Consolidated Copper Mines Ltd.*, (1889) 42 *Ch D* 160, *Ref.* [P 28 C 2, P 29 C 1]

(f) Companies Act (1913), Ss. 31, 156—Register of share-holders is not absolutely conclusive as to number of shares held by share-holder—It should be made as conclusive as it can be, consistently with proper interpretation of the Act—Person entered as share-holder treated as such and acting as such—He cannot deny his position to protect himself from liability.

The register of share-holders in a company is not absolutely conclusive as to the number of shares held by a person but it is necessary not only from the point of view of law but as a matter of policy to see that it is as conclusive as it can be made consistently with a proper interpretation of the Companies Act ; the share-holder is as much estopped from going against the register and disowning liability as the company is estopped from questioning his title when once he is put upon the register. When he has been treated as a share-holder and acted as such he cannot go back and deny his position to protect himself from liability, specially when he has full knowledge of his real position. [P 29 C 1,2]

(g) Companies Act (1913), S. 38 (1)—Name as share-holder not shown to be registered fraudulently or without sufficient cause—Order for rectification of share cannot be passed.

Where the contributory fails to show that his name was entered into the register fraudulently or without sufficient cause under S. 38 (1), an order for rectification of the share register by deleting certain number of shares standing against the name of the share-holder ought not to be passed. [P 29 C 2]

(h) Company—Person disputing liability as contributory, failing—Costs must be paid by him.

The costs of a contest by a person disputing his liability as a contributory and failing must, except under very exceptional circumstances, be paid by such contributory. The ordinary rule that a party failing must pay the costs applies to such cases : *Gower's Case*, (1868) 6 *Eq* 77, *Rel. on.* [P 29 C 2, P 30 C 1]

C. K. Daphtary—for Applicant.

M. C. Setalvad—for Official Liquidator.

Order. — This is an application by Balubhai Khimchand, contributory No. 27, for rectification of the share register of the company by deleting 200 out of the 250 shares standing against his name, and for an order that in the list of contributories settled by the Court he may be shown as the owner of 50 shares only. The company was compulsorily wound up by an order of this Court dated 12th November 1934, and the Official Liquidator was appointed liquidator of the company. The application is

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made under S. 184, Companies Act of 1913, which provides that notwithstanding the winding up order the Court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of the Act. S. 184 thus incorporates S. 38, under which, *inter alia*, if the name of a person is fraudulently or without sufficient cause entered in the register of members of a company, the person aggrieved, or any member of the company, may apply to the Court for rectification of the register. On an application under that section the Court has power to decide any question relating to the title of the aggrieved person to have his name omitted from the register, and generally to decide any question necessary or expedient to be decided for rectification of the register. The exercise of the jurisdiction given by this section is discretionary, having regard to the person who is the applicant before the Court, and to all the facts and circumstances of the case.

The list of contributories of this company was filed on 28th February 1935. No other contributory except Balubhai Khimchand appeared on the settling of the list, and the list was settled by the order of the Court dated 28th June 1935 except with regard to the 200 shares standing in his name. In this affidavit dated June 28, made in reference to the notice taken out by the liquidator on 1st April 1935 to settle the list, Balubhai Khimchand contended that he was the owner of fifty shares only of the company since 1930, and that in respect of the remaining two hundred shares being Nos. 3081 to 3280 he was the nominee of one Jivanchand Dharamchand who was the real owner thereof, and that he had not paid any consideration for the same. Jivanchand Dharamchand was one of the directors of the company. Balubhai stated that he was approached by Jivanchand with a request to sign a transfer form as purchaser of two hundred shares, and that he agreed to do so merely to oblige Jivanchand, and the shares were transferred to his name but on account of Jivanchand. He also alleged that the company was duly informed about this transfer. He accordingly prays for a rectification of the share register on the ground of his being such nominee. An affidavit was made in reply by one Narayanrao Babacharya Kale, the Chief Superintendent of the Office of the Court Liquidator on 24th July 1935, stating that this contributory, namely Balubhai, never informed the company or the liquidator that he held the two hundred out of the two hundred and fifty shares as the nominee of Jivanchand Dharamchand and that he never applied previously for the rectification of the share register until he made this application. Thereafter inspection was taken by him of the records of the company, and he put in a further affidavit dated July 15, which was not filed till August 2, stating that Mavji Govindji Sheth, who was a director and the chairman of the company, and continued to act on the strength of the two hundred shares as belonging to him, and that these shares were wrongly transferred to his name. According to him, therefore, the transfer of the two hundred shares to his name in the register was invalid and void and of no effect. An affidavit in rejoinder was put in by Mr. Kale on August 2 stating that the shares were transferred to the name of the contributory in pursuance of letters received from his former attorneys by the company, that the transfer was not invalid and void, and that in any event it was not open to the contributory to raise any dispute at this stage that he was not liable in respect of those two hundred shares.

There are thus two grounds on which rectification of the register is applied for, (*a*) that this contributory is only a nominee in respect of the two hundred shares, and (*b*) that the transfer of the shares to his name is invalid and void.

The ground of his being only a nominee was put forward by him first, but it was abandoned by his counsel at the hearing. The company, and now the liquidator, is not concerned with the person paying the consideration but with the person who has signed the transfer form as purchaser and whose name is entered as owner of the shares in the share register. Even if Balubhai Khimchand was the nominee of Jivanchand Dharamchand in respect of the two hundred shares, the company was not informed about it. Moreover, the shares were entered in his name with his knowledge and consent, and *prima facie* he is the contributory who is liable in respect thereof.

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The second ground, namely, that the transfer is invalid, is the only one which is now relied upon. The form of transfer is provided for in article 34 of the articles of association of the company. Such a form was executed by the parties concerned on 13th November 1933. The upper portion has been torn off. But it is clear from what remains that 200 shares bearing Nos. 3081 to 3280 of the company were transferred by Mavji Govindji Sheth to Balubhai Khimchand, the contributory in question, on 13th November 1933. The signature of the transferor has been attested by Jivanchand Dharamchand and that of the transferee by Ratanchand Jivanchand, presumably the son of Jivanchand, as the address of the two is the same. A specimen of Balubhai's signature as purchaser also appears on the transfer form. So far as the contract between the transferor and the transferee is concerned, it was made and executed on that date. But in the books of the company the transfer is completed on payment of the transfer fee and making the necessary entries in the share register. Under Art. 33 of the articles of association of the company the transferor shall be deemed to remain the holder of the shares which he has tranferred under the instrument of transfer until the name of the transferee is entered in the register in respect thereof. A man who executes a transfer of shares remains liable unless and until there is on the list a transferee who is legally liable to the company. Until the transferee's name is entered in the register, the dividends on the shares are also payable to the transferor, for he is deemed to be the holder of the shares until the entry is made. The entry in the register in this case was not made till 14th April 1934, when the transfer fee was received by the company, but there were several letters between November 1933 and April 1934, written to the company on behalf of the contributory by his former attorneys, insisting on the transfer of the two hundred shares to his name. Why the entry in the share register was delayed till then is not clear, but on 13th April 1934, there was a resolution issued by circular by the managing agents of the company as follows :—

Resolved that the 200 shares numbering from 3081 to 3280, standing in the name of Mr. Mavji Govindji Seth, be and are hereby transferred to the name of Mr. Balubhai Khimchand.

Underneath the word "passed," appear the names of the five directors, and three of them have put their initials against their names.

It was contended on behalf of Balubhai that the transfer was made by this resolution, and that the transfer is invalid, as the resolution is signed by three of the directors only and not the other two. Mavji Govindji seth has not signed the resolution. With regard to Dr. Damany, one of the directors, there is an endorsement on the resolution that the circular was presented to him, but he declined to sign it. Under Art. 111 a resolution passed without a meeting of the board of directors is valid if it is signed by all the directors, and as this was not signed by all the five, the resolution was invalid. On that very day, however, viz., 13th April 1934 a letter was written on behalf of the contributory to the company that a considerable time had elapsed and that he was surprised at the delay in the transferring of the shares to his name, and that if the shares were not transferred within 24 hours from the receipt of the letter, they should be returned to the attorneys on his behalf. The shares were transferred in the register of shares on 14th April, on which date the transfer fee was received by the company according to the endorsement on the transfer form. Thereafter there was a meeting of the directors on 19th April when the circular resolution of 13th April was confirmed, and a resolution was passed that the two hundred shares standing in the name of Mr. Mavji Govindji Sheth be and are hereby transferred to the name of Mr. Balubhai Khimchand. It is also stated in the minutes of that date, in parenthesis, "transferred on 14th April 1934." Counsel for the liquidator contended that the transfer was not effected by any of these resolutions, and that even if there was any irregularity in the circular resolution of 13th April, the irregularity was cured when the resolution was ratified by the directors at their meeting of 19th April. It was held in (1890) 45 Ch D 16 (1) that an irregular allotment of shares can

1. In re Portuguese Consolidated Copper Mines, Limited : Ex parte Badman, Ex parte Bosanquet, (1890) 45 Ch D 16 = 39 W R 25=2 Meg 249=63 L T 423.

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be afterwards ratified by the directors. On the same principle it was argued that the irregularity in the circular resolution of 13th April was cured when the transfer was ratified and confirmed by the directors at their meeting of 19th April. To that the answer of counsel for the contributory was that even the meeting of the directors of 19th April was irregular on the ground that notice of that meeting was not given to all the directors of the company. The minutes of the proceedings of 19th April show that only three of the directors were present. Under Art. 104 even two directors can form a quorum, and under Art. 107 a meeting at which a quorum is present can exercise all or any of the powers of the directors generally. It was however argued that no notice of the meeting was or could have been given to the other two directors, that an irregular resolution by circular could not be ratified by a resolution passed at an irregular meeting, and that the transfer was also void on that ground. The question therefore which raises for consideration is, was the transfer made by the resolution of 13th April which was confirmed at the meeting of 19th April 1934, or was it really made on 13th November 1933, and completed by reason of the registration on 14th April 1934 ? It has been held in the well-known case of 2 H L 325 (2) that (p. 350) :

> It is not the mere fact of the name appearing upon the register which makes a person liable as a member of the company. If he has not agreed to become a member he cannot be made a contributory.

Balubhai Khimchand agreed to become a member of the company on 13th November 1933, and carried on correspondence through his attorneys to have the transfer completed. It is true that under Art 35 the directors may at any time in their absolute and uncontrolled discretion and without assigning any reason decline to register a proposed transfer of shares, but there is nothing on the record to show why the registration was delayed till 14th April. It appears that the company received a threatening letter from Balubhai's attorneys on 13th April, asking the company to return the shares if they were not transferred in the register within 24 hours, and the transfer was completed by the 14th. The agreement of transfer was made in November 1933, and no action of the directors was necessary to validate it, though, as I have stated before, they could in their discretion refuse to accept the transfer. The mere delay in registration does not justify an assumption that there was a refusal to register the transfer before 14th April. In my opinion the irregularity, if any, of the meeting of 19th April for want of notice to all the directors does not invalidate a transfer duly made. The transfer was registered on 14th April, and at the date of the winding up there was upon the register a transferee who was legally liable to the company in respect of the shares : cf. (1870) 5 Ch A 298 (3).

I may mention here that this point about the alleged irregularity of the meeting was taken in a letter written on behalf of the contributory only on 9th August last when the application was part heard. It was not taken even in the second affidavit made by him after he had inspection of all the records of the company. But I will deal with it since it has been raised. It has been held that prima facie due notice must be given convening a meeting of the directors, and in default the meeting is irregular : see (1889) 42 Ch D 160 (4). But there is nothing on the record to show that such notice was not given, and the Court cannot assume that notice was not given to Mavji Govindji Sheth merely because there is an entry in the register of directors under date 14th April 1934, that he had ceased to be a director as he had sold his qualification shares. There is nothing to show that notice was not given to the other director also who was not present at the meeting. It is provided by Art. 105 that it shall not be necessary to give notice of a meeting of the directors to a director who is not in Bombay. There is nothing also to show whether the directors who were absent at the time were or were not in Bombay at or about the time of the meeting. It may also be mentioned that there is no provision in the articles as to how notice is to be given. No notice may be necessary if the absent director had knowledge of the meeting otherwise. It was for the

2. Oakes v. Turquand and Harding, (1867) 2 H L 325=36 L J Ch 949=15 W R 1201.

3. Symons' Case, (1870) 5 Ch A 298=39 L J Ch 461=18 W R 366=22 L T 217.

4. In re Portuguese Consolidated Copper Mines, Limited, (1889) 42 Ch D 160=58 L J Ch 813 =1 Meg 246.

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contributory in question to have proved to the satisfaction of the Court that notice was in fact not given to the absent directors, and in my opinion it is too late for him to apply that their evidence should now be taken, when the point was not raised by him in the first instance, and there is not even an affidavit made in these proceedings by any of them. Generally the Court is entitled to assume that everything has been done regularly and in due course, and there is nothing in this case against such an assumption.

It was argued on behalf of the liquidator that even assuming for the sake of argument that there was an irregularity in the transfer of the shares as alleged, the contributory is estopped from going against the register. He not only assented to his name being on the register, but insisted on its being put there, and he has acted like a share-holder. At the meeting held before the Commissioner on 6th October 1934, to consider whether the company should be wound up or not, he voted as the owner of two hundred and fifty shares, including the two hundred in dispute. He knew that Mavji Govindji Sheth also voted as the owner of the same two hundred shares, and yet he took no proceedings till long after the winding up to have this position cleared up. The register is not absolutely conclusive, but it is, in my opinion, necessary not only from the point of view of the law but as a matter of policy to see that it is as conclusive as it can be made consistently with a proper interpretation of the Act. In (1864) 33 L J Ch 617 (5), certain shares of a company were taken in the name of B at the instance of C who was the real owner of the shares. Then there was a certain arrangement made between C and the directors, not within their powers, nor confirmed by the company, under which the shares were to be transferred into C's name. In the subsequent winding up proceedings, however, B's name was put up as the contributory. An objection was taken on his behalf, but without success. At p. 618, the Lord Chancellor observes as follows :

It is perfectly immaterial to the share-holders of the company what secret agreement may be made, between the persons who are so registered and any other person, with regard to liability. The future subscriber has a right to look to the register. All the other share-holders have a right to depend upon the register, and to take the register as evidence of liability, unless that liability has been determined in a conclusive and binding manner by transactions on the part of the directors, which are legally valid and good to bind the company.

In my opinion, Balubhai Khimchand is as much estopped from going against the register and disowning liability, as the company would be estopped from questioning his title when once he was put upon the register. There may have been dealings between him and Jivanchand Dharamchand or between Jivanchand Dharamchand and Mavji Govindji Sheth which may give him an equity to call for an indemnity, but such dealings cannot be available to him as a shield to protect himself from his liability. He has been treated as a share-holder and has acted as such, and he cannot go back and deny his position. A man cannot be allowed to lie by while all appears to go on well, and repudiate his acts when the day for meeting his liability arrives. Counsel for contributory argued that there could be no estoppel unless the party who is estopped had full knowledge of his real position. I am not satisfied that Balubhai had not the knowledge which he now says he only obtained on looking at the records. He has been shifting his positing from time to time in order to avoid liability, but that liability is a statutory liability under which the creditors of the company have a right to compel the share-holders on the register to contribute to the extent of their shares towards the payment of the debts of the company, and it is too late for him now to raise the dispute that he is not responsible in respect of the two hundred shares. The contributory has failed to show that his name was entered in the register fraudulently or without sufficient cause under S. 38 (1), Companies Act. Under these circumstances the order for rectification of the share register ought not to be made as asked, and the application must be rejected. The contributory No. 27 is a share-holder and is liable to the liquidator in respect of all the 250 shares of which he is the owner according to the register. It has been held that the costs of a contest by a person disputing his liability as a contributory and

5. Ex parte Barret Mosley Green Coal and Coke Co. *In re*, (1864) 33 L J Ch 617=10 Jur (N S) 711=12 W R 925=10 L T 594.

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failing, must, except under very special circumstances, be paid by such contributory: see 6 Eq. 77 (6). There is no reason why the ordinary rule, that a party failing must pay the costs, should not apply in this class of cases. I have heard counsel for the liquidator and the attorney for the contributory on the question of costs. No special circumstances have been pointed out to warrant a departure from the ordinary rule. The contributory must pay the costs of the liquidator when taxed as between party and party. Costs to include costs of instructions. Counsel certified. The cost of the liquidator as between attorney and client to come out of the assets of the company in his hands. In the event of the liquidator being unable to recover the party and party costs from the contributory, the same also to come out of the assets in his hands.

R.M./R.K. *Order accordingly.*

6. Gowers' Case, (1868) 6 Eq 77=16 W R 751=18 L T 283.

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BARLEE AND SEN, JJ.

Shirinbai Dinshaw Chokshi and *another*—Appellants.

v.

Navroji Pestonji Vakil and *others*—Respondents.

First Appeal No. 371 of 1928, Decided on 8th July 1935, from decision of First Class Sub-Judge, Ahmedabad, in Suit No. 712 of 1921.

(a) Trust—Breach of—Breaches must be pleaded at outset unless trustee refused to show account—Refusal to show accounts—Beneficiary can sue for account and can formulate charges of breaches after inspection—Beneficiary seeing accounts—He must formulate charges at outset or at least before framing issues.

Breaches of trust must be pleaded at the outset unless the trustee has refused to show the trust account. If a trustee refuses to show account, a beneficiary has a clear right to sue for an account, and to be allowed to formulate his charges of "wilful default" and breaches of trust after inspection. But, where a beneficiary has had an opportunity of seeing the trust accounts, he must formulate his charges at the outset, or at any rate before the issues are framed. [P 33 C 1]

(b) Succession Act (1925), S. 118—Testator's bequest for charitable uses — His son and daughters living—His death within 12 months of will—Will not deposited according to law—Bequest held void.

A testator, who made a bequest of his property to religious or charitable uses, had a son and daughters living. The death of the testator occured within 12 months of the will which was also not deposited as required by law:

Held: that the bequest for religious and charitable purposes was void. [P 33 C 2]

(c) Succession Act (1925), S. 211 — Part of property of testator not included in will by oversight—Part nevertheless vests in executors.

Though a particular part of the property belonging to a testator is omitted to be included in the will by an oversight and therefore there is no specific clause in the will vesting that part in the execution and trustees thereof, the part nevertheless vests in them as executors. [P 33 C 2]

(d) Limitation Act (1908), Art. 120 — Suit for damages for alleged breach of trust in management—Art. 120, applies — Time runs from breach and not from date of loss.

A claim to damages for alleged breaches of trust in the management of the trust property is governed by Art. 120, Lim. Act, and time runs from the breach and not from the date of the loss consequent thereon: *In re, Somerset* v. *Earl poulett*, (1894) 1 *Ch* 231 and *Thorne* v. *Heard* and *Marsh*, (1895) *A C* 495, *Rel on*. [P 34 C 1]

(e) Limitation—Testator omitting part of property from will, creating religious trust of some property—Trust failing — Property omitted held not set apart for specific purpose—Suit for its recovery held governed by Art. 123 and not by S. 10 Limitation Act —Suit by next-of-kin to recover trust property—S. 10 held not applicable.

A testator omitted to mention a part of his property in his will and created a trust for charity and religious purposes with regard to some of the property, but the trust failed.

Held: that the property omitted was not property set apart from the general body of the estate of the testator for any specific purpose. A suit to recover this property was governed by Art. 123 and S. 10 had no application. Neither did S. 10 apply to a suit by the next-of-kin for recovery of property under trust: *Salter* v. *Cavenagh*, (1838) 1 *Dr* and *W* 668; 8 *I C* 635 *Disting*; *Churcher* v. *Martin*, (1889) 42 *Ch D* 312, *Rel. on*; 36 *Bom* 214, *not foll.* [P 34 C 2]

(f) Limitation Act (1908), S. 10 — Claim for damages for wilful default—Claim is not saved by S. 10. [P 35 C 1]

A claim for damages on footing of wilful default is not one to follow trust funds and is not saved by S. 10 of the Act.

C. N. Thakor and *K. J. Khandalawala*—for Appellants 1 and 2.

H. C. Coyajee, *K. N. Koyajee* and *R. J. Thakor*—for Respondents.

Barlee, J.—This is a suit for the administration of the estate of Framji Pestonji Vakil, who died in April 1897. As shown in the table, at p. 229 of the Printed Book, he left surviving him two

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daughters by a first wife, and a son, Behramji, and five daughters by a second wife, and both his wives had predeceased him. By a will executed on 18th February 1897, just two months before he died, he appointed his brothers Navroji Pestonji Vakil, and Jehangirji Pestonji Vakil and his four sons-in-law, Paymaster, Dalal, Patel and Vakil as the executors and trustees, and he had created a trust of his salt works, named Pestonsagar, for the benefit of his son and five daughters by his second wife. The trustees were directed to carry on the management of the salt works properly and to divide and distribute the income thereof—

whatever may remain over after deducting (thereout) the expenses relating to the salt works,

in the following proportion, viz., three annas each to the ladies and a one-anna share to Behramji for life with a gift over to their children. He stated also that his Municipal debentures, promissory notes, cash, etc., should be dealt with in accordance with the detailed directions, which make up the greater part of the document. Amongst the legacies were several for charity or religious purposes. Rs. 5,000 were to be given to the trustees of the Parsi Panchayat ; Rs. 1,425 to be expended on the purchase of Government Promissory Notes, which were to be held by the trustees, who were to use the interest for "throwing bread to dogs at Sabarmati and for putting a 'Parab' on the Achar Road." A "Parab" is a platform for feeding birds. The income of his bungalow at Sabarmati, which he had let out to the Post Office, after deducting the necessary expenses, should be taken by any of his daughters and

thereout expenses shall be made for 'Baj Rojgar' (ceremonies) of my late respected father and mother, my wife Jaiji, deceased Kharsedji and myself.

There is a further paragraph about the Sagar in the Thana District (which he called the agar). He wrote :

I have spent in all about Rs. 80.000 (eighty thousand) on it. Therefore if it fetches that much amount or some reasonable amount, then, the said 'Agar' shall be sold and with the amount (realized) Government Promissory Notes shall be purchased and the same shall be held in trust; and the interest thereon shall be paid to my above-mentioned five daughters in proportion to their respective shares.

After Framji's death the executors applied to the District Court of Ahmedabad that probate might be given to Bhai Navroji, afterwards Sir Navroji Pestonji Vakil. The probate was granted on 11th November 1897. On 8th June 1899, Navroji filed an account, Ex. 163, p. 291. He included in the schedule of the estate which he had recovered a bungalow at Rutlam valued at Rs. 2,500; and he stated that he had written off certain sums claimable under the account mentioned there which were such as could not be recovered. Amongst these irrecoverable amounts were sums debited in the accounts against F. N. Vakil and his son-in-law, J. D. Mehta. The former was a trustee under the will. Navroji managed the property up to the date of suit in 1921. In 1916 Behramji died leaving two daughters, Goolbai and Shirinbai, appellants, who were the plaintiffs in the lower Court. They had in the interval been married to F. A. Vakharia and D. B. Choksi. Up to the date of Behramji's death no body appears to have taken much interest in the administration of the trust. Sir Navroji was the senior member of the family, a gentleman of wealth and distinction, and apparently he was implicitly trusted. But in 1918 the beneficiaries began to discuss the management of the trust, and the correspondence which their learned counsel has read to us shows that some of them expressed dissatisfaction and that there was a general desire to sell the Sagar. The letter, Ex. 244, at p. 606 of the record, was sent to Sir Navroji by the seven beneficiaries, his five nieces and the appellants, who were daughters of his nephew. They wrote :

Our idea is that advantage should be taken of these good times and the salt-works at Ghatkopar as 'Peston Sagar' which our deceased respected Father Sheth Framji has left by his 'will' should be sold off, so that a good price may be realized and we may be benefited. We do not think, you, Sir, can have any difficulty or objection of any sort whatever to that being done, because in the 'will' of the deceased Sheth Framji there is a distinct clause for sale and power is given to you (in that behalf). You will please therefore make the necessary 'Bandobast' (arrangement) in that matter, and you will please invite 'tenders' from the public without keeping anyone as intermediary, and you 'Meherban' (kind Sir) along with two other trustees should open (the tenders) and after considering the same, you should act according to the opinion of the majority, and sell (the works) to a good (substantial) party at a good price. The trustees are not bound to accept any highest or lowest 'tender.' All those tenders should be sent in sealed packets to the residence in Bombay of your co-trustee Sheth Ardeshir Burjorji Paymaster, who will receive them and send them over to you, Sir, for their

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due disposal. Such sale should be properly advertised in well-known English and Gujarati newspapers. This is the only request. If you, Sir, will let (us) know your opinion in this matter, Bhai Ardeshir Burjorji Paymaster will make all the arrangements.

This is dated 27th May 1920. On 3rd July 1920, Sir Navroji replied and expressed the opinion that it would not be advantageous for the beneficiaries to sell the works, but agreed that if all the sisters came to the conclusion that the works should be sold, they might sell them; and he gave advice as to the procedure. The sale, however, did not go through, for the present appellants were unwilling to sell except for a very high price. For though on 15th January 1921, E. N. Vakil wrote that he had taken the opinion of all the sisters, and that they were of opinion that he should sell if the salt-works, fetched at least two lakhs; Mrs. Goolbai Vakharia, plaintiff 2, in a letter of 29th January 1921, warned the trustees that if they were to sell for less than four or five lakhs, she would take steps through the Courts for improper sale, and her sister sent a lawyer's notice to Sir Navroji to forbid the sale. In the meanwhile at the end of 1920, Mrs. Shirinbai Choksi, plaintiff 1, put her case in the hands of Messrs. Crawford Bayley & Co. They called for the accounts of the Sagar for three years. These were furnished. They, then, asked for explanations, and in a letter of 5th March 1921, Ex. 355, p. 557, they stated that their client was entitled to the residue of Framji's estate and asked for inspection of the whole account. Shortly after this letter, Messrs. Mansukhlal Mehta & Co., acting for both the plaintiffs sent a notice to Sir Navroji, and Messrs. Paymaster, Dalal and Vakil, the executors and trustees of the last will and testament of Framji Pestonji Vakil, in which they made definite charges of mal-administration of the estate of Framji.

The suit was filed on 8th June 1921. The plaintiffs were the daughters of Behramji. They joined as defendants Sir Navroji Pestonji Vakil, Messrs. Paymaster, Dalal and Vakil, three of the trustees, the six surviving daughters of the deceased Framji, i. e., Jerbai, Gulbai, Pirojabai, Dhanbai, Dinbai and Shirinbai, and Byramji's widow Meherbai, who was the executor of Byramji's will and had a life estate in the whole of his estate. The plaintiffs pleaded the will of their grandfather Framji and alleged that Sir Navroji who had proved it had concealed some of the deceased's property from the Probate Court, e. g., a valuable business, and had managed it for his own benefit : that the trustees had not accounted for two houses, or the outstandings and cash left by Framji; that they had wrongfully neglected to recover debts due to the estate ; and had wrongfully paid legacies for charity and religious purposes ; and, lastly, that they had mismanaged the deceased's salt pans in respect of which they were express trustees. It was claimed that the plaintiffs were entitled to a one-anna share in the salt pans, and they claimed an account on the footing of wilful default and their share of the salt pans and the residue of the deceased's estate. Sir Navroji denied the charges. He died during the course of the suit before the final hearing. At the trial the learned Subordinate Judge held that the present plaintiffs had a mere life interest in the salt pans and no present interest in the rest of the estate. He found that the charges of breach of trust were not made out and that most of the claims were time-barred. He made a declaration that the plaintiffs were entitled to a sixteenth share in the income and refused an account on the ground that they had not proved wilful default.

As I shall show, we do not agree with the view that the plaintiffs have a mere life interest in the Sagar ; and therefore consider that they are entitled to have their one-sixteenth share separated and given them. They must therefore have an account in this suit. Further their mother has died since the decree was made and they have now under their father Behramji's will an absolute interest in his estate and can make any claim against Framji's estate, which Behramji could have made unless barred by any rule of limitation or procedure. I shall consider these questions later on. But we cannot agree with learned counsel that they are necessarily entitled at this stage to an account on the footing of wilful default. Their right depends partly on substantive law and partly on rules of procedure. By S. 23, Trusts Act a trustee is liable for breach of trust, to make good the loss which a beneficiary has sustained; by S. 15 he is bound to deal with the trust property as carefully as a

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man of ordinary prudence would deal with his own, and a breach of trust is any act (or omission) which a man of ordinary prudence would not commit. He is also liable for a breach of any of the duties imposed on him by the Act, such as the duty of furnishing accounts and giving information. These are the only rules of substantive law which concern us in this case. If Sir Navroji employed trust funds for improper purposes, or negligently failed to recover trust funds or to employ trust property to the best advantage, he rendered himself liable to damages. This is clear from the Act, and I do not intend to refer to the English authorities which have been cited. But as a matter of procedure breaches of trust, both positive and negative (wilful default) must be pleaded at the outset unless the trustee has refused to show the trust account. If a trustee refuses to show accounts, a beneficiary has a clear right to sue for an account, and to be allowed to formulate his charges of "wilful default" and breaches of trust after inspection. But, where a beneficiary has had an opportunity of seeing the trust accounts, he must formulate his charges at the outset, or at any rate before the issues are framed. This is clearly laid down in the Civil Procedure Code, O. 6, R. 4:

> In all cases in which the party pleading relies on . . . . breaches of trust, wilful default . . . . particulars shall be stated in the pleadings,

and by O. 14, the issues can contain nothing which is not pleaded. In the present case accounts were not refused.

The solicitors of plaintiff 1 asked for 3 years' accounts and they were furnished. I am referring to the accounts of the *sagar* with which I am at present concerned. There is no dispute now about the accounts of Framji's residuary estate. There is no evidence that accounts of the *sagar* were ever refused. In 1922 issues were framed. In 1925 the plaintiffs asked for inspection. That this request came so late shows either that accounts had not been refused, or that their legal advisers were negligent. In any case the plaintiffs had every opportunity before the trial in 1928 of formulating their charges. Therefore they cannot at this stage be allowed to rely on breaches of trust, positive or negative, which were not pleaded; and if an account be ordered it must be a common account, and the plaintiffs cannot now search the books to find out further breaches and fresh evidence of the breaches which they alleged at the trial. I make these remarks as learned counsel has contended that at this stage it is not necessary for him to do more than show that he has a right to an account, and that on an account being taken he will be entitled to point out flaws as is done in an account suit. With respect I hold that this is not correct. The proper time for alleging and proving breaches has gone. It would be most unfair to decide otherwise now that the managing trustee is dead. (His Lordship after stating facts in great detail, proceeded.) The next question in the case is what are the rights of the plaintiffs in the undistributed residuary estate of Framji. This undistributed residue consists now of two bungalows, and a fund left to charity. The Sabarmati bungalow was bequeathed to the trustees for religious purposes, and Rs. 1,425 were bequeathed to them for the purchase of Government Promissory Notes for charitable purposes. Both these trusts failed since S. 118, Succession Act, forbids any man having a nephew or niece or any nearer relative to bequeath any property to religious or charitable uses except by a will executed not less than 12 months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons. Now, the deceased Framji had a son and daughters living and therefore the bequests for religious and charitable purposes were void inasmuch as his will was not made more than 12 months before his death, and was not deposited in accordance with law. These charitable and religious bequests therefore fail and fall into the residue of the estate. Secondly, the trustee of Sir Navroji took possession of a bungalow at Rutlam which by oversight was not mentioned in the will. This bungalow the learned Judge has treated as intestate property, and it has been suggested that the trustees took possession of it as trespassers. But they were entitled to take possession of it as executors, by S. 211, Succession Act, which provides:

> The executor administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

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Though then the bungalow is not vested in the executors and trustees of the will by a specific clause in the will, nevertheless it vested in them as executors. Behramji, under the Parsi law which is contained in Chap. 5, Part 3, Succession Act, had an interest in the undistributed residue of his father's estate, and that interest, if it still exists, has come to the plaintiffs under his (Behramji's) will. The last question in this appeal is which of the present plaintiffs' claims are barred by limitation. Art. 123 governs suit for a legacy or for a share of the residue bequeathed or for a distributive share of the property of an intestate. The period is 12 years, and the terminus a quo, the day on which the legacy or share becomes payable in this case in 1897. S. 10 applies to trusts. No suit against a person, in whom property has become vested in trust for a specific purpose, for the purpose of following in his hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time. This does not in terms apply to suits for damages for breach of trust. It certainly does not apply to suits for damages on the footing of wilful default, when ex hypothesi the money claimed has not come into the hands of trustees; and the reference to an account does not extend it to such claims. The section read as a whole justifies a decree for any trust funds shown, on an account being taken, to be in the hands of the trustee. Our first conclusion, then, is that the claim to damages for alleged breaches of trust in the management of the sagar, which were committed before June 8, 1915, are barred by Art. 120, which is the only Article applicable. Time runs from the breach and not from the date of the consequent loss. [(1894) 1 Ch 231 (1) and (1895) A C 495 (2).]

On these points there has been little or no dispute. The question on which the parties have been at issue is what property, if any, is to be included in the category of property vested in trust for a specific purpose. The disputed properties are : (1) the house at Rutlam and (2) the properties vested in trust for charity and religious purposes, which trusts have failed. They are the funds invested for dogs and birds and the Sabarmati house left for religious ceremonies. Learned counsel for the plaintiffs-appellants has contended that if the Rutlam house was a part of the residue as such, it was held by the trustees in trust for the next-of-kin, and he would apply the rule in 1 Dr & W 668 (3), an Irish case which has been cited and followed in Indian Courts : see 12 Bom L R 947 (4). Its principle, as stated by their Lordships of the Privy Council in 25 Bom L R 121 (5), is this (p. 124) :

> That if property be set aside by a testator from the general body of his estate and vested in trustees upon certain trusts, which upon the face of them are inadequate to exhaust the whole of the property, there remains as to the balance a trust impressed upon the trustees in favour of the next of kin or the heir at law, a trust for the purpose of which you have to do no violence whatever to the language of the will, for which it is unnecessary to disregard any intention or desire that the testator has expressed. . . .

In our opinion this principle has no application in our case. The Rutlam bungalow is not property set aside by Framji from the general body of his estate. It was not mentioned by him. The authority only covers property set aside for a specific purpose, and not the general body of the estate. The trustees hold this residue for the next-of-kin, but it does not come within S. 10. Were we to hold otherwise, it is difficult to see what meaning we could give to Art. 123. Further, the Privy Council ruling shows that the case of 1 Dr & W 668 (3), does not apply to suits by next-of-kin to recover property set apart for charitable and religious trusts which have failed. The rule in such a case is that in (1889) 42 Ch D 312 (6). The ratio decidendi is that S. 10, benefits those who sue to enforce express trusts and not those who claim not under express trusts but adversely to them. The passage which I have cited settles this point authoritatively. See also 2 Bom 388 (7),

1. In re Somerset: Somersett v. Earl Poulett, (1894) 1 Ch 231=63 L J Ch 41=70 L T 541=42 W R 274.
2. Thorne v. Heard & Marsh, (1895) A C 495=64 L J Ch 652=73 L T 291=44 W R 155.
3. Salter v. Cavenagh, (1838) 1 Dr & W 668.
4. Mojilal v. Gavrishankar, (1910) 8 I C 635=12 Bom L R 947.
5. Khaw Sim Tek v. Chuah Gnoh Neoh, 1922 P C 212=102 I C 832=25 Bom L R 121=49 I A 37 (PC).
6. Churcher v. Martin, (1889) 42 Ch D 312=58 L J Ch 586=61 L T 113=37 W R 682.
7. Lallubhai Bapubhai v. Mankuvarbai, (1876) 2 Bom 388.

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21 Bom 646 (8), and 4 Cal 455 (9). Mr. Thakor has relied on the view expressed by Beaman, J., in 36 Bom 214 (10). The learned Judge discussed the law at great length and held that the possession of a trustee was for the beneficiary under the trust, or in the alternative, supposing the trust to fail, for the settlor—or his heirs ; and that time does not begin to run until the trustee has set up an adverse title. This view was dissented from by Sir Basil Scott and Chandavarkar, J., in 37 Bom 447 (11), and has now been definitely overruled by the Privy Council in 25 Bom L R 121 (5). The result of this is that the plaintiffs' claim to the two bungalows and the charitable funds is barred by limitation.

In connexion with the residue, I should have mentioned the allegation made in the plaint that the trustees had been guilty of wilful default inasmuch as they had neglected to recover for Framji's estate outstandings which they might and should have recovered. I have already pointed out that a claim for damages on the footing of wilful default is not one to follow trust funds, and is not saved by S. 10, Limitation Act. But apart from this, the appellants cannot succeed since there is no evidence that any of the sums mentioned were debts due to the estate. Sir Navroji found in the deceased's books *khatas* in the names of several of his relations. He made enquiries and was told that these represented amounts paid by Framji for their education ; and that it was not Framji's intention to recover them. So he took no steps. It is difficult to suppose that he could have recovered the money by suit, as there was no evidence available, apart from the irrelevant admission in the deceased's account books.

This brings me to the end of the case. The appellants are entitled to an account of the sagar (including the reserve fund), and to a decree for one-sixteenth of its value. The estate of Sir Navroji must refund all sums recovered from the trust estate as interest recovered in excess. But the appellants cannot now claim damages for the investment of the trust funds in unauthorised securities—profits which the trustees should have earned but for their default, since these profits did not reach their hands. On all other points the appeal fails.

S.R./R.K. *Order accordingly.*

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8. Vundravandas v. Cursondas, (1897) 21 Bom 646.
9. Kherodemoney Dossee v. Doorgamoney Dossee, (1878) 4 Cal 455=3 C L R 315.
10. Cassamally Jairajbhai v. Sir Currimbhoy Ebrahim, (1912) 36 Bom 214=12 I C 225=13 Bom L R 717.
11. Mahomed Ibrahim v. Abdul Latif, (1912) 37 Bom 447=17 I C 689=14 Bom L R 987.

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BROOMFIELD AND DIVATIA, JJ.

Emperor

v.

Janke Gopal Koli

Criminal Ref. No. 106 of 1935, Decided on 18th September 1935, from order of Sess. Judge, Thana.

Criminal Trial—Permission to prosecute—Court Jamadar who is first grade constable is generally empowered to conduct prosecution—Magistrate cannot permit another to conduct prosecution when such Police Officer is present.

Court Jamadar is an officer generally empowered by the local Government to conduct prosecutions and is therefore an officer entitled to conduct the prosecution without the permission of the Magistrate. When there is an officer who has that power present in Court, it cannot be open to the Magistrate to give permission to some other person to conduct the prosecution either instead of or along with him without his consent. [P 36 C 2]

T. N. Walavalkar and *D. A. Dandekar*—for Complainant.

P. B. Shingne—for the Crown.

Broomfield, J.—There is a case under S. 324, I. P. C., proceeding in the Court of the Second Class Magistrate at Bassein. One Pedru, the person alleged to have been injured, instructed an advocate of this Court Mr. Kondkar to appear for him. The case was sent up by the police, and a Police Officer who is styled the Court Jamadar (it appears that he is a first grade head constable) was also present in Court, and to begin with the prosecution was conducted partly by Mr. Kondkar and partly by the Court Jamadar. Later on, when the witnesses for the defence were to be cross-examined, the Court Jamadar claimed the right to conduct the prosecution for the rest of the case instead of Mr. Kondkar. This claim was upheld by the Magistrate who declined to allow Mr. Kondkar to take any further part in the case. Then an application was made on Pedru's behalf to the Sessions Judge. He is of opinion that the Magistrate had no right to stop

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Mr. Kondkar conducting the prosecution, and he refers the case to this Court recommending that the Magistrate should be directed to allow Mr. Kondkar to appear and conduct the prosecution from the stage at which he was stopped. In our opinion the point in issue is settled by a certain Government resolution which was not known to the trial Magistrate nor to the learned Sessions Judge at the time when he referred the case, though he subsequently discovered it and mentioned it in a supplementary letter. The resolution which is dated 6th February 1923, and is No. 179 in the Home Department is in these terms :

Under the provisions of S. 495, Criminal P.C., 1898, and in supersession of the orders contained in Government Resolution No. 179 of 6th May 1922, the Governor in Council is pleased to prescribe that no prosecution in a Magistrate's Court shall be conducted by a Police Officer below the rank of 2nd Grade Head Constable.

That obviously has reference to the first part of Cl. (1), S. 495 and it means that a Police Officer below the rank of a second grade head constable cannot conduct a prosecution even with the Magistrate's permission. Then the resolution goes on in para. 2 to set out an amendment which has been made in the Bombay District Police Manual. The rule in the Manual was amended as follows:

Subject to the condition contained in sub-Cl. 4, S. 495, Criminal P. C., 1898, a prosecution in a Magistrate's Court may be conducted by a Police Officer not lower in rank than a second grade Head Constable. The sanction of the District Magistrate shall be obtained before any prosecution is withdrawn under Cl. 2, S. 495.

Now the words "a prosecution may be conducted" are capable of two interpretations. They might mean that officers of the rank indicated are authorised to conduct prosecution provided they obtain the permission of the Magistrate under sub-S. (1), S. 495. On the other hand the words may also mean that this rule made by Government Resolution empowers the Police Officers who are specified to conduct prosecution. In our opinion the latter appears to be the correct construction of the rule. In the first place it would be superfluous for Government to make a rule that officers not below the prescribed rank may be permitted by the Court to conduct prosecutions, for that is stated in the section. In the second place it is important to compare the resolution which I have just set out with the preceding Government Resolution No. 179 of 6th May 1922, which is superseded by the later one. The rule laid down in that resolution was as follows :

(1) Police Officers of and above the rank of Sub-Inspector have been empowered under S. 495 (1) to conduct prosecution in a Magistrate's Court subject to the restriction in Cl. (4), S. 495, Criminal P. C.

(2) Magistrate may permit Head Constables, 1st Grade, to conduct cases in their Court.

(3) Police Officers of and above the rank of Sub-Inspectors are also competent under S. 495 (2), Criminal P. C., to withdraw from a prosecution.

That rule therefore empowered certain Police Officers, Sub-Inspectors and those of higher rank, to conduct prosecutions, and that clearly had reference to the latter part of sub-S. (1), S. 495 and the rule meant that those officers were entitled to conduct prosecutions without permission of the Magistrate and it then went on to say that officers of lower rank that is 1st grade head constables, could conduct prosecutions with the Magistrate's permission. Now, turning to the later resolution, if we were to accept the construction that the words "a prosecution may be conducted" in the new rule merely mean that the officers referred to may conduct provided the Magistrate gives permission, then there is no provision in the rule empowering any Police Officers, however high their rank, to conduct prosecutions without the Magistrate's permission. It seems to us to be extremely unlikely that Government intended by this new rule to deprive the higher Police Officers of the authority which they had possessed before. The intention rather seems to have been to extend that authority to all Police Officers of rank not lower than that of 2nd grade head constables. On that view of the construction of the orders of Government the Court Jamadar in this case is an officer generally empowered by the local Government to conduct prosecutions and is therefore an officer entitled to conduct the prosecution without the permission of the Magistrate. When there is an officer who has that power present in Court, we think that it cannot be open to the Magistrate to give permission to some other person to conduct the prosecution either instead of or along with him without his consent.

There is one point raised in the Sessions Judge's supplementary letter which

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I should mention. He refers to the new Government Resolution but expresses the opinion that it should not be construed as empowering Police Officers not lower in rank than a second grade head constable to conduct prosecutions because of the provisions at the end of the rule that the sanction of the District Magistrate shall be obtained before any prosecution is withdrawn under sub-S. (2), S. 495. That clause provides that "any such officer" (i. e., apparently an officer generally or specially empowered by the local Government in this behalf) shall have the like power of withdrawing from the prosecution as is provided by S. 494, and the provisions of that section shall apply to any withdrawal by such officer. In view of this provision in the statute there might no doubt be some difficulty and possibly some question as to the validity of the provision in the Government rule that the sanction of the District Magistrate shall be obtained. That however is not a matter with which we are concerned in this case. The learned Sessions Judge thinks that this requirement of obtaining the sanction of the District Magistrate indicates that Government did not intend to empower these Police Officers to conduct prosecutions. That view however seems to be untenable, because if we look at the provisions of sub-S. (2), S. 495, we see that it is only such officers as are empowered by Government to conduct prosecutions who could be entitled to withdraw a case, either with or without permission. The restriction therefore which is placed upon their power to withdraw does not indicate that they are not intended to be empowered to conduct prosecutions.

For these reasons we hold that there was nothing illegal in the procedure followed by the learned Magistrate and we make no order on this reference.

B.D./R.K. *Order accordingly.*

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BARLEE AND SEN, JJ.

Shantiniketan Co-operative Housing Society, Ltd. and *another*—Defendants 2 and 3—Appellants.

v.

Madhavlal Amirchand and *others*—Plaintiffs—Respondents.

First Appeal No. 172 of 1932, Decided on 1st July 1935, from decision of Joint First Class Sub-Judge, Ahmedabad, in Civil Suit No. 1000 of 1930.

(a) Interpretation of Statutes — Words of statute having different meanings — Courts lean against interpreting statute with retrospective effect.

Courts are bound to give effect to intention of the legislature and are bound therefore by the express words of the legislature, when those words can have but one meaning. Where however it is possible to construe the words of the legislature in more than one way, the Courts will always lean against an interpretation which will give retrospective effect to the terms of an enactment. [P 40 C 1]

(b) Practice — Subsequent event — Statute affecting vested rights of parties, passed after passing of decree but before hearing of appeal therefrom — Appellate Court should consider new statute affecting rights in appeal before it.

Appellate Courts do and are entitled to take into account changes of circumstances which occur between date of the decree of the lower Court and the date of the hearing of the appeal. [P 40 C 2]

If after passing of the decree and before the hearing of an appeal therefrom, a new enactment is passed having a retrospective effect and affecting the vested rights of parties, appellate Court must take into account the effect of the new Act on the rights under consideration, while deciding the appeal: 36 *Mad* 439; 1928 *Bom* 16 and 267 and 1928 *Bom* 267, *Foll.* [P 41 C 1]

(c) Bombay Co-operative Societies Act (8 of 1925), (as amended by Bombay Act 8 of 1933), S. 72-A — S. 72-A has retrospective effect—Society registered under Act of 1925 is "company" within the meaning of S. 3, Land Acquisition Act.

Bombay Act 8 of 1933, which adds S. 72-A to Bombay Co-operative Societies Act of 1925, is a validating Act and is necessarily retrospective in its operation. Therefore a Co-operative Society registered under Societies Act of 1925 is a "company" as defined in S. 3, Land Acquisition Act and therefore it is competent for the local Government to acquire land on its behalf and where acquisition proceedings are regular, the land vests in the local Government. [P 41 C 1]

G. N. Thakor and *B. G Thakor* — for Appellants.

J. C. Shah, *H. C. Coyajee* and *U. L. Shah*—for Respondents.

Barlee, J. — The appellants are the Shantiniketan Co-operative Housing Society, Ltd., and Ramanlal Govindlal Shah. The respondents are the heirs of Patel Amichand Kuberdas and the Secretary of State for India in Council. The facts to which I shall have to refer in connexion with the main issue in the suit are few and undisputed. The appellants are a co-operative society registered under Bombay Act 8 of 1925. Appellant 1 is the co-operative society and appellant 2 is one of its members. In 1925

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by the said Act the Bombay legislature made a provision for co-operative housing societies and in 1927 the Government decided to acquire land in Ahmedabad for the Shantiniketan Housing Society, and a Notification under S. 4, Land Acquisition Act was promulgated. Part of the land which it was proposed to acquire belonged to Patel Amichand Kuberdas, and he objected to the acquisition of his land on the ground inter alia that the acquisition was illegal. His objection was overruled and a Notification was issued under S. 6 of the Act. S. 6 provides:

When the Local Government is satisfied that any particular land is needed for a public purpose, or for a company, a declaration shall be made to that effect . . . .

and sub-S. (3) :

The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a company.

After issuing a valid notification the local Government has jurisdiction to direct the Collector to take order for the acquisition of the land. In consequence of this notification the acquiring officer commenced proceedings to determine the amount of compensation to be given and an award was made. The respondent took the money allotted to him under protest, and he made an appeal to the District Court, or rather he asked the acquiring officer to refer the matter of compensation to the District Court under the Land Acquisition Act. At that stage he took no other steps, and the reason was that a suit had already been decided in which the legality of acquisition for housing societies had been in issue and an appeal was pending in this Court. The respondent waited to see the result of the appeal. In 1930 it was decided by a bench of this Court that a co-operative society registered under Bombay Act 8 of 1925 was not a society registered within the meaning of the Co-operative Societies Act of 1912 and was not a company within the meaning of S. 3 (e), Land Acquisition Act, and that Government were not entitled to acquire land for such a society. After that decision the respondent, Patel Amichand Kuberdas, filed Regular Suit No. 1000 of 1930 in the Joint First Class Subordinate Judge's Court at Ahmedabad. He prayed for a decree directing such of the defendants, [(1) The Secretary of State for India, (2) The Shantiniketan Co-operative Housing Society, or (3) Ramanlal Govindlal Shah,] as might be found to be in actual possession of S. No. 50/2 of Moje Kochrap to remove any buildings, structures or other deposits made on the said land, to restore it to its original condition and to hand over the same to him, the plaintiff, as against the refund of Rs. 3,891 or such other sum as might be found to be refundable to the defendants or any of them, and, secondly, a decree for damages and costs.

The principal questions which were at issue in the trial Court were: (1) whether or not defendant 2 was a "company" within the meaning of S. 3 (e), Land Acquisition Act; (2) whether the suit was barred by acquiescence, estoppel, waiver and laches; (3) whether it was open to the plaintiff to challenge the decision of Government by contending that the acquisition was not for a "public purpose," and (4) whether pecuniary compensation would not give adequate relief to the plaintiff in the circumstances of the case. The learned Subordinate Judge, following the above-mentioned decision of this Court in F. A. No. 272 of 1929 (1) held that the acquisition was not for a "company." He also held that it was not for a "public purpose" and that the defendants were not entitled to relief on the ground of acquiescence or estoppel. However for reasons—which are not very plain—he gave the defendants an option of paying compensation instead of giving up the land, and decided that the amount of compensation proper was Rs. 9,377.

This appeal has been filed by the society and by Ramanlal. The Secretary of State is shown as respondent 2. The rights of the parties depend on the valitity of the acquisition proceedings. We agree that the defendants are not entitled to resist eviction on the ground of estoppel or acquiescence. The plaintiff Amichand potested against the intended acquisition ; and, after he was evicted, he took part in the acquisition proceedings under protest. It is true that after the land had been taken from him and was lying idle, before Ramanlal, the second appellant, commenced to build, he, or his son for him, re-entered as tenant. But when Ramanlal commenced to build he made a final protest by means of a written notice. He did not file a plaint at

1. Sheth Chinubhai Lalbhai v. Secy. of State, First Appeal No. 272 of 1929, decided on 7th July 1930, by Madgavkar and Barlee, JJ.

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once because he wisely waited for the decision of this Court in the previous litigation. But we think that this delay does not afford ground for defendant 2, who started building operations in spite of the plaintiff's warning, to complain that he is entitled to any relief on the ground of acquiescence or estoppel. The main ground on which the learned Subordinate Judge has decided this case is that the acquisition proceedings were illegal, since in his opinion the society was not a "company" within the meaning of the Land Acquisition Act. A "company" is defined in S. 3 (e) of that Act.

The expression company means a company registered under the Indian Companies Act, 1882, ... and includes a society registered under the Societies Registration Act, 1860, and a registered society within the meaning of the Co-operative Societies Act, 1912.

The learned Subordinate Judge has, as I have said, followed the decision of this Court that this society was not one within the meaning of the Co-operative Societies Act, 1912, and I need not go into this point. He also held that the acquisition was not for a public purpose. It seems to us that in this he was going outside the case because S. 6 of the Act provides that the Government must make a declaration that the land is required for a public purpose, or for a company, and in this case there was no such declaration. The wording of the declaration was merely that the land was required for the Shantiniketan Housing Society, and that cannot be understood to mean that it was for a public purpose. The learned Subordinate Judge, therefore had only to see whether the Housing Society was a "company" and nothing more. It is not now argued that the learned Subordinate Judge's decision on this point was incorrect at the time at which it was made. The case for the appellants is that by virtue of the addition of S. 72-A, to the Bombay Co-operative Societies Act, 1925, it must now be held that the appellant society is a "company" within the meaning of the Land Acquisition act, that S. 72-A must have retrospective effect, and therefore that it must be held that the appellant society was a "company" within the meaning of the Land Acquisition Act at the date of the acquisition proceedings. S. 72-A which was added to the Bombay Co-operative Societies Act, 1925, by Bombay Act 8 of 1933, runs as follows :

All references to the Co-operative Societies Act, 1912, occurring in any enactment made by any authority in British India and for the time being in force in the Presidency of Bombay shall, in the application to the said Presidency, of any such enactment, be read and construed as references to this Act and anything done or any proceeding commenced in pursuance of any such enactment on or after the date on which this Act shall have come into operation shall be deemed to have been or to have been commenced and to have had effect as if the reference in such enactment to the Co-operative Societies Act, 1912, had been the reference to this Act, and no such thing or proceeding shall be deemed to have been invalid on the ground that such enactment did not refer to this Act.

Put shortly, this means that the reference to the Co-operative Societies Act, 1912, in S. 3 (e), Land Acquisition Act shall be read as a reference to the Bombay Co-operative Societies Act, 1925, and that in consequence a society registered within the meaning of the Bombay Co-operative Societies Act, 1925, is a "company" within the meaning of the Land Acquisition Act. In consequence, it is now permissible and legal for the local Government to acquire lands compulsorily for the benefit of the appellant society. The bone of contention in the present appeal is whether this section is retrospective in effect and legalizes the acquisition proceedings of 1927. The principle which we have to apply is stated by Maxwell, at p. 186, Edn. 7, in the following words :

Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. . . . They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.

No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment.

This is the rule which has always been followed in Courts in India. We have been referred to a number of cases on the point. In 36 Mad 439 (2), it was held as follows :

2. Kanakayya v. Janardhan Padhi, (1913) 36 Mad 439=8 I C 736 (F B).

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Where an appeal from a decree in ejectment passed under the old law is heard after the commencement of Madras Act 1 of 1908 (Estates Land Act) the defendant being a ryot in possession of ryot land on such date, he is entitled to claim a right of occupancy under S. 6, Cl. 1 of the Act, notwithstanding the original decree.

That was a case in which the Court gave retrospective effect to an enactment of the local legislature. In the order of reference to the Full Bench their Lordships quoted a passage from the judgment of Bowen, L. J., in 9 Q B D 672 (3) viz., (p. 677) :

No doubt, as a general rule, a statute does not affect pending proceedings, but that rule is only a guide where the intention of the legislature is obscure; it does not modify the clear words of a statute.

In 5 M I A 109 (4), their Lordships remark (p. 126) :

Their Lordships are of opinion, that this Legislative Act is not to be construed as affecting existing contracts ; at all events, not those contracts on which actions have already been commenced, for Statutes are prima facie deemed to be prospective only, ... and there are no words in this Act sufficient to show the intention of the Legislature to affect existing rights.

In 30 Bom L R 60 (5) Lord Blanesburgh, in delivering the judgment of the Privy Council, stated (p. 63) :

The principle which their Lordships must apply in dealing with the matter has been authoritatively enunciated by the Board in 1905 A C 369 (6) where it is in effect laid down that, while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment.

We do not think it necessary to cite any further cases to illustrate the principle that Courts are bound to give effect to the intention of the legislature and are bound therefore by the express words of the legislature, when those words can have but one meaning. Where, however, it is possible to construe the words of the legislature in more than one way, the Courts will always lean against an interpretation which will give retrospective effect to the terms of an enactment. Our duty then is to interpret the words of the enactment in Bombay Act 8 of 1933 and to see whether we are bound to give it retrospective effect. To this question there can be but one answer. The legislature says that all references to the Co-operative Societies Act, 1912, shall be read as references to this Act, viz., Bombay Act 8 of 1925 and anything done or any proceeding commenced in pursuance of any such enactment on or after the date on which this Act, i.e., Bombay Act 8 of 1925, shall have come into operation shall be deemed, etc. Clearly this is an Act of indemnity to validate actions and proceedings prior to the date of the Act of 1933, i.e., all Acts or proceedings on or after 1925. We do not think that the legislature could have put their intention in clearer words. Mr. Coyajee, who has argued the case for the respondents, has conceded that this Act of 1933 must be given retrospective effect, but he would restrict it to actions and proceedings on or after 1925 which had not led to judicial proceedings. Where, as in this case, there has been not only a suit but a decree before the date of the amending Act the learned counsel asks us to hold that it cannot be presumed to be the intention of the legislature to interfere with the rights of the parties. The argument comes to this that we are to look upon the decree of the lower Court as binding inasmuch as it was passed in 1932 before the date of the amending Act.

But appellate Courts do and are entitled to take into account changes of circumstances which occur between the date of the decree of the lower Court and the date of the hearing of the appeal. Authority for this is to be found in the case of 36 Mad 439 (2) which I have already cited. There an appeal was preferred from a decree in ejectment, and after the hearing of the suit and before the hearing of the appeal an Act was passed which give the appellant an occupancy right and deprived the respondent, the landlord, of his vested interest under the decree. In 29 Bom L R 1334 (7) which was decided in 1927, from an appeal made in 1924, His Lordship Sir Amberson Marten, Chief Justice, based his finding on a legislation of 1926 and 1927. The headnote runs :

3. Quilter v. Mapleson, (1883) 9 Q B 672=52 L J Q B 44=31 W R 75=47 L T 569.
4. Doolubdass Pettamberdass v. Ramloll Thackoorseydass, (1851-54) 5 M I A 109=7 Moore P C 239=1 Sar 403 (P C).
5. Delhi Cloth and General Mills Co. v. Income-tax Commissioner, 1927 P C 242=106 I C 156=54 I A 421=30 Bom L R 60 (P C).
6. Colonial Sugar Refining Co. v. Irving, (1905) A C 369=74 L J P C 77=21 T L R 513=92 L T 738.
7. Motilal v. Kasambhai, 1928 Bom 16=105 I C 864=29 Bom L R 1334.

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The amendment made by Act 27 of 1926 in the definition of the word 'attest' in S. 3, T. P. Act, 1882, has been given a retrospective effect by Act 10 of 1927.

In 30 Bom L R 565 (8) which was an appeal decided in 1927 from a decision of 1925, the decision was based by Madgavkar, J. on Act 31 of 1926. It is clear then that, if necessary, a Court of appeal will give retrospective effect to legislation even if by so doing they are obliged to interfere with the rights given to parties by decrees. I do not think it necessary to refer to any more of the cases which the learned counsel have cited to us. The principle is quite clear and each decision depends on its own facts and we have to decide what is the effect of the Act of 1933. As I have said, this is a validating Act which is necessarily retrospective in its operation, and the only question before us is whether we can read into it any exceptions as required by Mr. Coyajee. We are not prepared to do so. We hold that the appellant society is and was at the date of the acquisition proceedings a "company" within the meaning of the Land Acquisition Act, and that therefore it was competent for the Local Government to acquire land on its behalf and the acquisition proceedings were regular, and that the land therefore vested in the Local Government. The appeal, therefore, must succeed, and it is not necessary for me to deal at length with the other findings of the lower Court. We are of opinion that the finding of the learned Judge on the question whether the land was acquired for a "public purpose" was irrelevant. It was for the Government to declare whether it was for a "public purpose" and they had not done so. Secondly, the learned Subordinate Judge was in error in refusing to give possession after he had found that the title still vested in the plaintiff and therefore all the evidence and the findings as to the value of the land are irrelevant. It will be for the District Court to value the land and to give compensation to the latter owner, the respondent, in the acquisition proceedings. The appeal, therefore, succeeds. In view of the peculiar circumstances of this case we feel that each party should bear his own costs throughout. The amount deposited by Mr. Thakor's client to be returned. Cross-objections dismissed. No order as to costs.

8. Yakubkhan v. Guljarkhan, 1928 Bom 267=111 I C 287=52 Bom 219=30 Bom L R 565.

Sen, J.—The principal question in this appeal is whether the acquisition was for a "public purpose," or for a "company" as defined in the Land Acquisition Act. The fact to notice in this connexion is that there is no declaration in the notification under S. 6 of the Land Acquisition Act that the acquisition was for a "public purpose." Reading the sections subsequent to S. 6, it seems to us that only a declaration to the effect that the land acquisition was needed for a "public purpose" would give jurisdiction to the Land Acquisition Officer to take further steps as provided in the Act, and that there being no such express declaration, the acquisition proceedings cannot be regarded as valid for such purpose, even though the purpose might have been in fact a "public purpose." The learned advocate for the appellant, however, contends that if the acquisition was not for a "public purpose," it was certainly for a "company" as defined in the Act, and he bases his contention on the argument that S. 72-A, Bombay Co-operative Societies Act, 1925, which was incorporated in the Act by an amending Act of 1933, has and is meant to have retrospective effect, and that this retrospective effect of the new section is so clear and unquestionable that there can be no scope for any argument based on ambiguity or on questions affecting the vested interests of any party. There is no doubt that if the new section can be interpreted in one way only, viz., that it has retrospective effect, the legislation must be given effect to, however hard the result may be.

It was held in a previous case in this Court that registration under the Bombay Co-operative Societies Act, 1925, does not bring a co-operative society within the definition of a "company" in S. 3, Land Acquisition Act, as that definition merely includes a society registered under the Societies Registration Act, 1860 and a registered society within the meaning of the Co-operative Societies Act, 1912. S. 73, Bombay Co-operative Societies Act, 1925, repeals the Co-operative Societies Act, 1912 and it was held that the registration under the Bombay Act of 1925 should not be construed as one under the India Act of 1912, so that the reference to the India Act of 1912 in the

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definition of "company" should not be taken to be one to the Bombay Act of 1925. As this result had apparently not been intended by Government, they inserted the validating S. 72-A by which anything done or any proceeding commenced in pursuance of any enactment (containing a reference to the Act of 1912) in force in the Presidency of Bombay on or after the date on which the Bombay Act of 1925 came into operation was to be deemed to have been done, or to have been commenced and to have had effect as if the reference, e. g., in the Land Acquisition Act, to the India Co-operative Societies Act, 1912, had been a reference to the Bombay Co-operative Societies Act, 1925. There does not seem to be any room for ambiguity or doubt in the wording of the section, the intention of the legislature in enacting this new section being most clearly and unequivocally expressed. This being so, we must hold that this new section has retrospective effect, and the society is a "company" as defined in S. 3 (e), Land Acquisition Act.

Mr. Thakor's next contention is that if that be so, the Court would be justified in taking this new section into consideration and giving effect to it, though the section was not in existence when the suit was decided by the First Class Subordinate Judge of Ahmedabad; and in support of this proposition Mr. Thakor has drawn our attention to the following rulings: 36 Mad 439 (2); 40 Mad 818 (9); 6 Bom 113 (10); 25 Bom 606 (11); 26 Bom L R 1217 (12); 29 Bom L R 1334 (7); 30 Bom L R 565 (8); 31 Bom L R 484 (13); 33 Bom L R 266 (14); 37 Bom L R 499 (15) and 44 Cal 47 (16). Mr. Coyajee however though admitting that the new provision of law clearly provides for retrospective effect, contended that there is an exception to this general rule, viz., in cases in which civil actions have already arisen, and have either been finally decided, or are still pending at the date of the new provision; and in support of this argument he has invited our attention to 58 Cal 817 (17), 5 M I A 109 (4), 30 Bom L R 60 (5), 1898 A C 469 (18), 35 Bom L R 404 (19), 36 Bom L R 1195 (20) and 1905 A C 369 (6).

On going through this latter set of cases, it seems to us that in all of them, except the Calcutta case, the new law which had come into operation and the effect of which was considered had not expressly provided for retrospective effect, and in our opinion these cases do not go beyond the principle that a new law which is not clearly retrospective, either by express language or necessary implication, should have no effect on suits pending or already decided. As regards the Calcutta case, 58 Cal 817 (17), its ratio decidendi seems to be inconsistent with that of two previous cases decided by the Calcutta High Court, viz., 48 C L J 386 (21) and 15 Cal 376 (22), and we find ourselves unable to agree with the line of reasoning adopted in this case. This decision is contrary to the effect of all the cases on which Mr. Thakor has relied, which is briefly this, that the Court of appeal is not merely a Court of error, and that when a change of circumstances or of law has taken place between the date of the decree of the lower Court and the hearing of the appeal, the appellate Court is entitled to take such change into consideration and pass orders accordingly. We agree with Mr. Thakor's contention in this respect and hold that this Court is competent to take into consideration the effect of S. 72-A, Bombay Co-operative Societies Act, and that we would be justified in the circumstances of this case in taking it into consideration. There is no doubt that an appeal is a continuation of

9. Muthuswami Ayyar v. Kalyani Ammal, 1918 Mad 1299=38 I C 223=40 Mad 818.
10. Sakharam Mahadev v. Hari Krishna, (1881) 6 Bom 113.
11. Rustomji v. Seth Purshottamdas, (1901) 25 Bom 606=3 Bom L R 227.
12. Shankarbhai v. Motilal, 1925 Bom 122=85 I C 197=49 Bom 118=26 Bom L R 1217.
13. Pandharinath v. Thakoredas, 1929 Bom 262=122 I C 76=31 Bom L R 484.
14. Amritlal v. Kantilal, 1931 Bom 280=133 I C 244=33 Bom L R 266.
15. Secy. of State v. Bombay Municipality (No. 1), 1935 Bom 347=158 I C 151=37 Bom L R 499.
16. Nuri Mian v. Ambica Singh, 1917 Cal 716=34 I C 869=44 Cal 47=24 C L J 140=20 C W N 1099.
17. Kanakkanti Roy v. Kripanath Gain, 1931 Cal 321=131 I C 398=58 Cal 817=52 C L J 597=35 C W N 125.
18. Young v. Adams, 1898 A C 469=67 L J P C 75=14 T L R 373=78 L T 506.
19. Sundrabai v. Manohar, 1933 Bom 262=144 I C 781=35 Bom L R 404.
20. Pir Bux v. Mahomed Tahar, 1934 P C 235=151 I C 326=61 I A 388=58 Bom 650=36 Bom L R 1195 (P C).
21. Maniruddin Mandal v. Sreemati Charu Sila Dassi, (1928) 48 C L J 386=114 I C 148.
22. Tupsee Singh v. Ram Sarun Koer, (1888) 15 Cal 376 (F B).

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the suit and that in the present case there has been no final decree.

In the result therefore we hold that the Co-operative Society in this case is a "company" coming within the definition of the said word in S. 3, Land Acquisition Act. The declaration in S. 6, Land Acquisition Act, however does not speak specifically of a "company." It says that whereas by a previous notification it was notified that the lands specified in the schedule to the notification were needed under the Land Acquisition Act for the purpose stated in the said notification, viz., for erecting houses to be acquired at the expense of the Shantiniketan Housing Society, Ltd., Ahmedabad. . . . It is also hereby finally declared under the provisions of S. 6 of the said Act that the said lands are required for the purpose stated above. The notification however makes it clear that the acquisition was necessary for the purposes of the appellant society. As however we have held that this society came within the definition of a "company" in the Land Acquisition Act and as the definition itself expressly mentions that the company includes a society registered within the meaning of the Co-operative Societies Act, 1912, we are of opinion that the declaration, though it did not expressly say that the acquisition was for a "company," sufficiently complied with the requirements of S. 6, and that being so, we hold that the subsequent proceedings held under the succeeding sections of the Land Acquisition Act were held with proper jurisdiction and were therefore valid. I do not wish to add anything on the other points arising in this case, and I agree to the order proposed by my learned brother.

B.D./R.K. *Appeal allowed.*

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N. J. WADIA, J.

Municipal Borough, Dhulia—Plaintiff—Appellant.

v.

Mahomed Isak Abdul Karim—Defendant—Respondent.

Second appeal No. 317 of 1932, Decided on 6th August 1934, from decision of Dist. Judge, West Khandesh, Dhulia, in Appeal No. 52 of 1931.

(a) Bombay Municipal Election Rules, R. 11—Once Municipal Election Roll is published it cannot be altered except under R. 10.

Rule 11 provides that when the list of voters has been prepared and, where necessary, revised as provided, in accordance with any order passed in that behalf by the Municipality or by the Judge in appeal, a copy thereof signed by the Returning Officer shall be the Municipal Election Roll. The wording of this rule clearly implies that once a roll has been published under R. 6 the only alterations which can be made in it are those which are made under sub-Rr. (4) and (6) of R. 10. It is not open to the Municipality to make any alterations not falling under these two sub-rules of R. 10, even though errors in the roll may afterwards be detected. [P 44 C 2; P 45 C 1]

(b) Bombay Municipal Boroughs Act (18 of 1925), S. 206—Suit against Municipality—Notice is essential.

Before bringing a suit against a Municipality for an injunction restraining it from giving fresh qualification to a person as a voter notice of the suit to the Municipality under S. 206 is absolutely essential: 1927 *P C* 176, *L. P. A. No.* 14 *of* 1929 and *S.A. No.* 669 *of* 1930, *Foll.*, and 1918 *Mad* 62 (*FB*), *Ref.* [P 43 C 2; P 46 C 1]

P. V. Kane—for Appellant.

Y. V. Dixit—for Respondent.

Judgment. — The respondent had filed a suit against the appellant, the Municipal Borough of Dhulia, for an injunction restraining it from giving a fresh qualification to certain persons who, according to him, had been disqualified by an order passed by the District Judge under R. 10, sub-R. (5), of the Municipal Election Rules. On 21st July 1930, the electoral roll of the Municipality was published under R. 6 for the purposes of the triennial elections which were to take place on 19th October 1930. On 6th August 1930, a reference was made by the Chief Officer to the Municipality under sub-R. (3) of R. 10 pointing out that 936 persons whose names appeared on the list of voters were disqualified under sub-S. (2) of S. 11 of the Act. The Municipality rejected the reference and the respondent preferred an appeal to the District Judge against the decision of the Municipality under R. 11, sub-R. (5) of the Municipal Election Rules. On 30th September 1930, the District Judge allowed the appeal holding that those persons who had not paid all arrears of qualifying taxes within three months next preceding the date mentioned in sub-S. (2) of S. 11 were not entitled to have their names retained on the list of voters. After this decision the Municipality made an application to the District Judge on 7th November 1930, in which it pointed out that the order passed by the District Judge in the appeal directing the

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Municipality to omit the names of those who had not paid all arrears of qualifying taxes within three months next preceding the date mentioned in sub-S. (2) of S. 11, had been construed by some as disqualifying the voters who were qualified to vote under sub-S. (1) of S. 11, Bombay Municipal Boroughs Act. As there was some doubt and confusion on the subject it asked for directions of the Court in the matter. The District Judge held that there was no ambiguity in the language of the judgment and declined to give any further directions. After this order the Municipality on 15th November 1930, passed a resolution by which it retained on the electoral roll the names of some persons whose omission had been ordered by the District Judge, on the ground that these persons were entitled to be on the roll because of their being qualified to vote under S. 11 (1) of the Act.

It was contended by the Municipality in the trial Court that it was competent to it to retain on the electoral roll the names of some of the persons who were held to be disqualified by the District Judge, by reason of the fact that they were voters for the election of members to the Bombay Legislative Council, and that the plaintiff's suit was bad for want of notice under S. 206, Bombay Municipal Boroughs Act. The trial Court held that notice was not necessary and that the act of the Municipality was illegal. On appeal the District Judge confirmed the decree of the lower Court holding that it was not competent to the Municipality to retain on the electoral roll the names of some of the persons who were held by the District Judge to be disqualified, and that no notice was necessary under S. 206 of the Act. Against this decision the Municipal Borough of Dhulia has filed this second appeal. With regard to the question whether it was competent to the defendant Municipality to retain on the electoral roll the names of some of the persons who were held by the District Judge to have been disqualified, I am of opinion that the view taken by both the lower Courts is correct. The roll which was first published by the Municipality on 21st July 1930, contained the names of persons qualified to vote under S. 11, sub Ss. (1) and (2) of the Act. In this roll 936 persons who were shown as qualified to be voters under S. 11, sub-S. (2), were reported to the Municipality by the Chief Officer as having been wrongly so entered.

It appears that some of these persons were also qualified to vote under sub-S. (1) of S. 11, but this qualification had by mistake not been shown against their names in the roll already published. It was open to these persons to have this omission rectified under R. 10, sub-R. (1). It was also open to the Returning Officer, who in this case was the Chief Officer of the Municipality, to bring the error to the notice of the Municipality. Neither of these things was done. The Chief Officer only brought to the notice of the Municipality the fact that these 936 persons had been shown as qualified under R. 11, sub-R. (2), when they were not. His reference was rejected by the Municipality and the plaintiff thereupon preferred an appeal to the District Judge from the decision of the Municipality. In appeal the District Judge directed that the names of those out of these 936 persons who had not paid all arrears of qualifying taxes within three months next preceding the date mentioned in sub-S. (2) of S. 11, should be omitted from the roll. After this order the Municipality, instead of omitting from the roll the names of all the persons who were held by the District Judge to have been disqualified, retained on the roll the names of some of them who, though disqualified under S. 11, sub-S. (2), were qualified under S. 11, sub-S. (1). It seems to me clear from the rules that the Municipality had no power to make any alterations in the rolls already published, except such as had been made by it on a reference by the Returning Officer under R. 10, sub-R. (4), or such as had been ordered by the District Judge on appeal under sub-R. (6), R. 10. R. 11 provides that when the list of voters has been prepared and, where necessary, revised as provided, in accordance with any order passed in that behalf by the Municipality or by the Judge in appeal, a copy thereof signed by the Returning Officer shall be the Municipal Election Roll. The wording of this rule clearly implies that once a roll has been published under R. 6 the only alterations which can be made in it are those which are made under sub-Rr. (4) and (6), R. 10. It is not open to the Municipality to make any alterations

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not falling under these two sub-rules of R. 10, even though errors in the roll may afterwards be detected.

The omission from the roll of persons who were qualified under S. 11, sub-S. (1), was no doubt a hardship. But it was one which the persons aggrieved could have remedied if they had taken proper action under R. 10, sub-R. (1). There was no power left in the Municipality, after the appeal to the District Judge, to make any further alterations in the electoral roll. The Municipality's own power to alter the rolls is strictly limited by R. 10 to alterations made on a reference by the Chief Officer or by persons aggrieved. Such references have under the rules to be made within a fortnight from the date of the first publication of the list—in this case (21st July 1930)—and under sub-R. (4), R. 10, these references have to be decided by the Municipality at its next meeting. This period had passed long before 15th November 1930—the date on which the Municipality actually made the alterations. I agree therefore with the view taken by the learned District Judge and by the learned First Class Subordinate Judge, that it was not competent to the Municipality to make any alterations in the roll originally published, except those ordered by the District Judge.

I am however unable to accept the finding of the lower appellate Court that no notice under S. 206, Bombay Municipal Boroughs Act was necessary. It was contended on behalf of the appellant Municipality that in view of the decision of their Lordships of the Privy Council in 54 I A 338 (1), a notice under S. 206 was necessary. The question in 54 I A 338 (1), was one of notice under S. 80, Civil P. C. Prior to this case there had been a marked difference of opinion between the view taken by this High Court on the one hand and the High Courts of Calcutta, Madras and Allahabad on the other with regard to S. 80, Civil P. C. It had been held by this Court that in suits to restrain by injunction the commission of some official act prejudicial to the plaintiff where the immediate result of the act would be to inflict irremediable harm, S. 80 did not compel the plaintiff to wait for two months before bringing his suit. Their Lordships of the Privy Council agreeing with the view taken by the other High Courts held that the provisions of S. 80 were express, explicit and mandatory, and admitted of no implications or exceptions. Both the lower Courts have taken the view that the ruling in 54 I A 338 (1) was not applicable to the facts of the present case, it was a ruling with regard to S. 80, Civil P. C., and not with reference to S. 206, Bombay Municipal Boroughs Act. But in two recent decisions of this Court: L. P. A. No. 14 of 1929 (2) & S. A. No. 669 of 1930 (3), the decision of their Lordships of the Privy Council in 54 I A 338 (1) was held applicable to suits coming under S. 206, Bombay Municipal Boroughs Act.

In L. P. A. No. 14 of 1929 (2) it was held by Madgavkar and Barlee, JJ., that S. 206, Bombay Municipal Boroughs Act did not limit the requirement of notice to particular kinds of suits for damages or money, and that the decisions in 22 Bom 230 (4) and 22 Bom 636 (5), in so far as they purported to limit the necessity of notice to particular kinds of suits according to the relief claimed, could not, in view of the decision in 54 I A 338 (1), be supported. In S. A. No. 669 of 1930 (3), Murphy, J., held that the reasoning in 54 I A 338 (1) must be held applicable to suits coming under S. 206, Bombay Municipal Boroughs Act, and pointed out that there were two decisions of this Court holding that the view taken in 54 I A 338 (1) applies also to suits in which a notice was required under S. 206, Bombay Municipal Boroughs Act. The decision in L. P. A. No. 14 of 1929 (2) is a decision of a Division Bench and is binding on this Court.

It has been contended on behalf of the respondent that S. 206 is not applicable to this case because the action of the Municipality in retaining the names on the list of voters, in spite of the order of the District Judge, was not an act which was done or which purported to have been done in pursuance of the Act. The

1. Bhagchand Dagadusa v. Secy. of State, 1927 P C 176=104 I C 257=54 I A 338=51 Bom 725 (P C).

2. Patel Mathurbhai Barbadbhai v. Patel Ambalal Samaldas, L. P. A. No. 14 of 1929, decided on 3rd July 1930, by Madgavkar and Barlee, JJ.

3. Ganesh Shripad Chitnis v. The Belgaum City Municipality, Second Appeal No. 669 of 1930, decided on 26th September 1933, by Murphy, J.

4. Patel Panachand v. Ahmedabad Municipality, (1896) 22 Bom 230=1896 P J 296.

5. Harilal v. Himat, (1896) 22 Bom 636.

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words "purporting to be done" used in S. 80, Civil P. C., were interpreted in 41 Mad 792 (6), and it was held by a Full Bench of the Madras High Court that the question of the good faith or bad faith of the Public Officer either as regards his belief in the legality or propriety of his act, or the limit of his powers, or the existence of facts justifying the exercise of such powers, is irrelevant in the consideration of the question whether the officer is entitled to notice under S. 80, Civil P. C. In the course of his judgment Sadasiva Ayyar, J., said (p. 810):

> But if the act done is so outrageous and extraordinary that no reasonable man could detect in it any resemblance to any act which the powers of such an officer could allow him to do on the facts as represented and declared by such officer, his mere allegation that he did the act in his official capacity would not suffice.

It is contended on behalf of the respondent that the act of the Municipality in the present case was so outrageous and extraordinary that it could not be said that it acted or purported to act in pursuance of the Bombay Municipal Boroughs Act. I am unable to accept this contention. That the Municipality had an honest doubt as to the interpretation of the order passed by the District Judge is clear from the application which was made by it to the District Judge on 7th November 1930, asking for directions on this particular point. The District Judge unfortunately refused to pass any order on the ground that there was no ambiguity in the language of his judgment. After this, as appears from Ex. 18, the Municipality made a reference to the Collector asking for his orders in the matter. It seems clear from this that the Municipality was honestly under the impression that the District Judge's order did not prevent it from amending the roll so as to enter on it the names of persons who it thought had been through oversight omitted from the electoral roll, and whose qualifications under S. 11, sub-S. (1), had not been considered at all. The act of the Municipality was clearly one which purported to have been done under Rr. 10 and 11 of the Rules under the Municipal Boroughs Act. In my view therefore notice of the suit was necessary, and the plaintiff having brought his suit without such notice, the suit must fail. The decree of the lower Court will therefore be reversed and the appeal allowed with costs throughout.

B.D./R.K. *Appeal allowed.*

6. Koti Reddi v. Subbiah, 1918 Mad 62=46 I C 86=41 Mad 792=34 M L J 494 (F B).

A. I. R. 1936 Bombay 46

BEAUMONT, C. J. AND BLACKWELL, J.

In re, *P. D. Shamdasani*—Petitioner.

Misc. No. 100 of 1935, Decided on 23rd September 1935.

(a) Bombay City Municipal Act (3 of 1888), S. 28 (k)—Election—Objections as to election involving question of law or of fact—Commissioner must decide all objections.

There is nothing in sub-S. (k) of S. 28 which restricts the objections which the Commissioner is required to hear and decide to questions of fact. If questions of law or mixed questions of law and fact arise, and the Municipal Commissioner is not a lawyer himself, he must do the best he can, but he is not entitled to refuse to perform the duty imposed upon him by the Act by saying that he does not know the law and is not competent to perform the duty. [P 47 C 2]

(b) Bombay City Municipal Act (3 of 1888), S. 28 (k)—Election—Objection to nomination is not objection to poll—Aggrieved parties—Remedy is provided by S. 33.

An objection, that a particular person's nomination is not valid, is not an objection to or regarding the poll, which the Commissioner is required to hear within the meaning of sub-S. (k) of S. 28 of the Act. The Commissioner, before deciding that a poll should be held, has to make up his mind as to the validity or invalidity of the nomination and that decision having been given by him before the poll is held, any question as to the validity or invalidity of the nomination is not an objection within the meaning of that section. The rights of an aggrieved person in regard to the validity of an election are amply covered by S. 33 of the Act, and the validity of an election may be challenged as therein provided before the Chief Judge of Small Causes Court. [P 49 C 1]

Petitioner in person.

Jamshed Kanga—for Municipal Commissioner.

Lalji Goculdas—for Intervener.

Beaumont, C. J.—This is a petition under S. 45, Specific Relief Act, by which in substance the petitioner asks that the Municipal Commissioner may be directed to hear and decide certain objections which the petitioner takes to a recent election in B Ward in the city. Before coming to facts, it is desirable to look at the material provisions of the City of Bombay Municipal Act, 1888, under which the election was held. S. 26 provides that candidates for election at a ward election must be duly nominated in writing in accordance with the provisions of the section; and under sub-

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S. (2) (e) (iii) if any person nominated is disqualified for being a councillor for any of the reasons set forth in S. 16, the Commissioner shall declare such person's nomination invalid. Under S. 16, a person is disqualified if he fails to pay any arrears of any kind due by him to the Corporation within three months after a special notice in that behalf has been served upon him. Then it is provided in S. 26 that if there are more candidates than there are vacancies, the election is contested election ; and S. 27 (1) provides that when a ward election is contested, a poll shall be taken seven days after the day fixed for the election, and sub-S. (2) provides that at least three days before the day of the poll, the Commissioner shall cause the names of all the persons validly nominated with their respective abodes and descriptions to be published in the Bombay Government Gazette and in the local newspapers. Then S. 28 contains various provisions relating to contested ward elections, and the material one is sub-S. (k) which provides that the Commissioner shall as soon as may be, declare the result of the poll, specifying the total number of valid votes given for each candidate, and he shall, as soon as may be, hear and decide all objections, if any, to or regarding the poll, made to him in writing not later than 5 o'clock of the afternoon of the day after the poll and shall cause lists to be prepared for each ward, specifying the names of all candidates, and the number of valid and the number of rejected votes given to each candidate. Then S. 29 enables the Corporation, with the sanction of the local Government to make rules for the conduct of elections. And then S. 33 directs that an election petition, in which the validity of any election is in question, shall be heard by the Chief Judge of the Small Causes Court, and any such petition has to be presented within fifteen days from the date on which the list prescribed under sub-S. (k) of S. 28 was available.

The facts in the present case are very simple. An election was to be held in Ward B, and the Municipal Commissioner fixed 20th August as the day of election. There were originally four candidates for one vacancy, so that the election was a contested election, and a poll had to be held on 27th August. Before the day of the poll, two of the candidates withdrew, leaving only the present petitioner and Mr. Allarakhia who intervenes on this petition. After the poll, and before 5 o'clock on the following day, the petitioner gave notice in writing to the Commissioner of certain objections to or regarding the poll taken on 27th August. Those objections are set out in the letter of 28th August 1935, which is annexure B to the petition. The first objection was that the taking of the poll was illegal and invalid. The second objection was

that without prejudice to the aforesaid objection, the said poll was conducted in a manner contrary to law.

Then objections 3, 4 and 5 were in terms based on the validity of one of the rules made under the Act ; and objection 6 was that "the votes taken at the poll for Mr. Allarakhia are all invalid." The Municipal Commissioner in his reply of 29th August 1935, stated that objections 1 to 5

are purely questions of law and are outside the scope of S. 28 (k), City of Bombay Municipal Act.

As regards objection 6, the Commissioner asked for further particulars, but he has never refused to hear objection No. 6, and that matter is standing over until this petition is disposed of. I think the Municipal Commissioner was wrong in refusing to hear and decide all the objections 1 to 5 on the ground that they raised points of law. There is nothing in sub-S. (k) of S. 28 which restricts the objections, which the Commissioner is required to hear and decide, to questions of fact. If questions of law or mixed questions of law and fact arise, and if the Municipal Commissioner is not a lawyer himself, he must do the best he can, but he is not entitled to refuse to perform the duty imposed upon him by the Act by saying that he does not know the law and is not competent to perform the duty. I think that he ought to have heard, at any rate, objections 1 and 2, which were expressed in general language, as well as objection 6. But in this petition the grounds for those objections have been explained, and it appears that objection No. 1—that the taking of the poll was illegal and invalid—is based on the contention that Mr. Allarakhia was disqualified from being a candidate under S. 16 of the Act, and that therefore the acceptance of his nomination was invalid ; and the petitioner asks not only for a direction on the Municipal Commissioner to hear that ques-

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tion but for an order on him to produce the Municipal books, which will show that Mr. Allarakhia was in arrears with his dues, and that a notice had been properly served upon him. In my opinion, that is not an objection to or regarding the poll within the meaning of S. 28 (k). It is an objection to the acceptance of the nomination of Mr. Allarakhia, which precedes any question of a contested election, and any question relating to the poll. In my opinion therefore the Municipal Commissioner—now that we know the real reasons for objection No. 1—is entitled to say that it is not a matter which arises under S. 28 (k).

It further appears from the petition that objection No. 2 is really based on the same contention as that in the next three objections. The contention is that the last part of R. 8 of the rules made under S. 29 is invalid, and that the conduct of the election under that rule has resulted in a lot of illegal votes being recorded. Technically, I think, that is a question which the Commissioner could be called upon to decide; but it seems to me that he could only decide it in one way. The Commissioner is a servant of the Corporation, and he is conducting the poll under the rules made by the Corporation with the sanction of the Local Government, and I think that he is bound by the rules as they stand and cannot question them, and he would be bound so to decide upon any objection which challenged the validity of a rule. If the rules are to be questioned, they must be questioned in the appropriate Court. Although therefore I think that we have jurisdiction to make the rule absolute, and direct the Commissioner to decide that objection, it would obviously be futile to do so, if the Commissioner is bound to answer the question in one way only. So that in the exercise of the Court's discretion, I think that we ought to refuse to make the rule absolute.

It was contended further that the case did not fall under S. 45, Specific Relief Act, because it was suggested that provisos (d) and (e) were not complied with. There is, I think, no force in that contention. The desire of the petitioner is that the Municipal Commissioner may be directed to hear and decide his objections and if he gets an order to that effect, his objection will be heard and decided, and the relief will be effective. Whether the objections are decided in such a way as to afford him any substantial relief is irrelevant. I am of opinion also that there is no other adequate remedy open to the petitioner, because the right of proceeding under S. 33 before the Chief Judge of the Small Causes Court has not at present arisen. But, for the reasons given, I think that in our discretion we ought not to make the rule absolute.

Blackwell, J.—The question before the Court is whether on the facts now known, the Court ought to order the respondent to hear objections 1 to 5 taken by the petitioner in his petition, and set out by him in his letter dated 28th August 1935, to the respondent. It is conceded by the respondent that it is his duty to hear the objection No. 6 in that letter.

The first objection is that the taking of the poll was illegal and invalid. It is now known on the facts before the Court that that objection relates to the validity of the nomination of one of the candidates, Mr. Allarakhia. Under S. 26, City of Bombay Municipal Act, 1888, candidates for election at a ward election must be duly nominated in writing; and by sub-S. (2) (e) (iii) of that section a duty is imposed upon the Commissioner to declare whether any person's nominatien is invalid, if he comes to the conclusion that he is disqualified from being a councillor for any of the reasons set forth in S. 16. Then by Cl. (j), sub-S. (2), S. 26, the Municipal Commissioner has to decide whether the election will take the form of a contested election or not—that depending upon whether the number of valid nominations exceeds that of the vacancies. He can only make up his mind whether the election is to be a contested election or not after he has come to a decision upon the question whether the nominations or any of them are invalid, by reason of the disqualifications contained in S. 16. When the Municipal Commissioner has so made up his mind,—S. 27 requires that if a ward election is a contested one, a poll shall be taken seven days after the day fixed for the election, and by sub-S. (2) a duty is imposed upon the Commissioner of causing the names of all persons validity nominated to be published three days before the day of the poll in the Bombay Government Gazette and in the local newspapers. Therefore it is plain that a decision by

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the Commissioner as to the invalidity of a nomination is a condition precedent to the fixing of a poll. The petitioner here contends that it is open to him to say that Mr. Allarakhia's nomination was invalid, and that that is an objection to or regarding the poll, which the Commissioner is required to hear within the meaning of sub-s. (k), S. 28 of the Act. In my opinion, such an objection is not an objection to or regarding the poll. The Commissioner, before deciding that a poll should be held, has to make up his mind as to the validity or invalidity of the nomination, and in my opinion that decision having been given by him before the poll is held, any question as to the validity or invalidity of the nomination is not an objection within the meaning of that section. The rights of an aggrieved person in regard to the validity of an election are amply covered by S. 33 of the Act, and the validity of an election may be challenged as therein provided before the Chief Judge of the Small Causes Court.

The next question arising is whether objections 2 to 5 are objections which the respondent ought now to be ordered to hear as objections to or regarding the poll within the meaning of S. 28, sub-s. (k). It is apparent from the contents of the petition itself that all those objections are based upon the alleged invalidity of Part 2, R. 8 of the rules which have been made by the Corporation with the sanction of the Local Government under the power contained in S. 29, City of Bombay Municipal Act. In my opinion, it is not open to the Municipal Commissioner to take into account the validity or invalidity of any rules made with the sanction of the Local Government under which he holds the poll. In my judgment, the contention that a rule so made was ultra vires the Corporation would not be an objection to or regarding the poll, within the meaning of sub-s. (k), S. 28. The Act itself contemplates by S. 29 that the Corporation shall be empowered to make rules with the sanction of the Government; and when such rules have been made, it is, I think, the bounden duty of the Municipal Commissioner to conduct the poll on the basis of and subject to such rules, without question on his part. In my opinion, it could not possibly have been the intention of the Legislature that the validity of a rule made under the express power conferred by S. 29 of the Act should be open to question as an objection to or regarding the poll within the meaning of sub-s. (k), S. 28. It being plain from the terms of the petition that objections 2 to 5 all relate to the alleged invalidity of Part 2, R. 8, it is, in my opinion, not open to the Court to treat any of those objections as an objection falling within sub-s. (k), S. 28, and accordingly not open to the Court to direct the Municipal Commissioner to hear those objections. For the above reasons, I think that the Court cannot make this rule nisi absolute, and that it should be discharged.

Beaumont, C. J. — Rule discharged with costs—including the costs of the hearing before Davar, J.,—in favour of the respondent. The intervener should bear his own costs.

B.D./R.K. *Rule discharged.*

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BEAUMONT, C. J. AND BLACKWELL, J.

Municipal Corporation, Bombay — Plaintiffs—Appellants.

v.

Haji Eisa Haji Oosman—Defendant —Respondent.

O. C. J. Appeal No. 6 of 1935, Decided on 20th September 1935.

(a) Bombay City Municipal Act (3 of 1888), Ss. 140 and 211—Tax for water charged by meter is not charge under S. 211.

Tax for water supplied to a property by a meter cannot be called a property-tax within the meaning of S. 140 and it cannot be made a charge on property under S. 211 of the Act. [P 50 C 1, 2; P 51 C 1]

(b) Interpretation of Statutes—Construing one Act with reference to another is dangerous.

It is dangerous to attempt to construe one Act by a reference to decisions on other Acts quite different in character, even though the actual phrase in the several Acts may be the same. [P 51 C 1]

✲(c) Bombay City Municipal Act (3 of 1888), S. 169—Charge by meter for water supplied is apportionable de die in diem.

Charges by meter are necessarily apportionable de die in diem by reading the meter and a person cannot be held liable for any water supplied and charged by meter before he takes possession of the property. [P 51 C 1]

F. J. Coltman and *Jamshed Kanga*—for Appellants.

C. K. Daphtary—for Respondent.

Beaumont, C. J.—This is an appeal by the Municipality of Bombay against

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a decision of Mr. Justice Tyabji ; and the principal question is, whether upon the true construction of the Bombay City Municipal Act, 1888, a charge for water supplied by meter in respect of certain premises can be recovered by means of a charge on the premises under S. 212 of the Act. The question turns upon the construction of a few of the sections of the Act in question. Property taxes are imposed by S. 139, and S. 140 defines "property-taxes" as including amongst other things,

a water-tax of so many per centum of their rateable value as the Corporation shall deem reasonable with reference to the expenses of providing a water-supply for the city, . . . –

and then S. 141 enacts what premises are to be subject to the water-tax. Putting it shortly, they are premises connected with the Municipal water-works, or premises situate in a district in respect of which the Commissioner has given public notice that sufficient water is available from Municipal water-works for furnishing a reasonable supply to all the premises in that district. So that, under those two sections, any premises falling within the ambit of S. 141 are liable to water-tax, which is to be levied by a percentage on the rateable value of the premises. Then we come to S. 169, which provides in sub-s. (1) that:

(1) The Commissioner may—

(a) in such case as the standing committee shall either generally or specially direct, instead of levying the water-tax in respect of any premises liable thereto under S. 141, charge for the water supplied to such premises by measurement at such rate as shall from time to time be prescribed by the said committee in this behalf.

It is to be noted that under that subsection a charge on the premises for water supplied by meter is substituted for the levy of water-tax. It has been argued by Mr. Coltman on behalf of the Municipality that the charge for water supplied by meter remains a water-tax. But it seems to me that that view is inconsistent with the plain words of S. 169, sub-s. (1) and sub-s. (3), to which I will refer in a moment. No doubt, the Act might have been framed so as to provide that water-tax should be levied either on the percentage value of the premises, or on the amount of water consumed, in which case the tax, however levied, would still have been a water-tax. But that is not what is done by S. 169. Sub-S. (2) of S. 169 deals with compounding and is not relevant, and sub-s. (3) provides :

A person who is charged for water by measurement or who has compounded for a fixed periodical sum shall not be liable for payment of the water-tax, but any sum payable by him on account of water and not paid when it becomes due shall be recoverable by the Commissioner as if it were an arrear of water-tax.

The whole of that sub-section would be unnecessary if the charge for water supplied by meter remained a water-tax. The sub-section recognizes that it is not a water-tax, but directs that an arrear in respect thereof shall be recoverable as if it were an arrear of water-tax. It is necessary, therefore, to look at the sections which provide how arrears of water-tax are recoverable. The arrears can be recovered by distress under S. 203 and the following sections, or under S. 209 from the occupier if the person primarily liable fails to pay, or by a suit under S. 211. Then comes S. 212, which is the material section, and which is in these terms:

Property-taxes due under this Act in respect of any building or land shall, subject to the prior payment of the land-revenue, if any, due to Government thereupon, be a first charge upon the said building or land and upon the goods and chattels, if any, found within or upon such building or land and belonging to the person liable for such taxes.

That section in terms imposes a charge in respect of property-taxes due, which taxes include water-tax, but do not, in my opinion, include the charge by meter under S. 169. The only question, therefore, to my mind, is whether the recovery of arrears of payments by meter can be made by enforcing a charge under S. 212, having regard to the words of S. 169 (3), namely, that such arrear shall be recoverable "as if it were an arrear of water-tax." If it were an arrear of water-tax, the money could be recovered by distress, or by a suit or by enforcing a charge under S. 212; but the difficulty I feel in regard to the latter method is that in respect of the money due by meter, there is no charge under S. 212, that charge being confined to property-taxes ; and if we are to hold that money due by meter can be recovered by the enforcement of a charge under S. 212, we shall have to read into sub-s. (3) of S. 169 at the end after the words "as if it were an arrear of water-tax" some such words as "and as if the charge under S. 212 applied to sums so due." This being a charging Act, we are not, in my opinion, at liberty to

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read into it words which are not there, and to say that moneys due by meter can be recovered by enforcing a charge which does not extend to such moneys. The mere giving of a charge is not by itself a method of recovery. The charge exists under S. 212 in every case where property-taxes are in arrear; the charge may or may not be enforced; the Municipality may recover the arrears by other methods. It is only the enforcement of the charge which is really a method of recovery: and in respect of an arrear of a charge by meter this method of recovery is not available, because there is no charge to enforce. That being the case, I think the decision of the learned Judge on this question is right.

I am not prepared, however, to accept the view which the learned Judge took that S. 169 is based upon some contractual relationship, which distinguishes a charge by meter from a water-tax. In my opinion, there is no contractual relationship introduced by S. 169. With regard to the Madras cases on which the learned Judge relied, I think it is dangerous to attempt to construe one Act by a reference to decisions on other Acts quite different in character, even though the actual phrase in the several Acts may be the same. The Madras cases dealt with taxes not imposed with reference to the particular land sought to be charged. Personally, therefore, I think that no assistance can be derived from those cases. We have to decide the question entirely on the construction of Ss. 140, 141, 169 and 212 of the present Act, and on the true construction of those sections I am of opinion that the charge claimed by the Municipality is not established. With regard to the second point as to the personal liability of defendant 3 (the respondent) for charges due before the date at which he purchased the property, it seems to me clear that charges by meter are necessarily apportionable de die in diem by reading the meter, and defendant 3 cannot be held liable for any water supplied and charged by meter before he took possession of the property, and as defendant 3 has paid into Court an amount sufficient to cover the charge for which he is personally liable, that claim of the Municipality also fails. The appeal, therefore, will be dismissed with costs.

Blackwell, J.—I agree. S. 169, Bombay City Municipal Act, 1888, makes a distinction between a water-tax and the charge for water supplied to premises by measurement which the Commissioner is empowered to charge in the cases therein referred to. S. 140 makes a water-tax as therein defined a property-tax. There is nothing in S. 140 to suggest that a charge for water supplied by measurement is a property-tax. S. 212 of the Act provides that the property-taxes due under the Act shall be a first charge upon the building or land and upon the goods and chattels found thereon. So far, therefore, it seems to be plain that the charge conferred by S. 212 as far as water is concerned is only applicable to the water-tax mentioned in S. 140. Then sub-s. (3) of S. 169 provides:

A person who is charged for water by measurement or who has compounded for a fixed periodical sum shall not be liable for payment of the water-tax, but any sum payable by him on account of water and not paid when it becomes due shall be recoverable by the Commissioner as if it were an arrear of water-tax.

The authorized methods of recovery provided for in the Act, such as distress and a suit, are clearly made applicable to a sum payable on account of water treated as an arrear of water-tax; but the question is, whether the first charge provided for by S. 212 in respect of a property-tax is applicable to water supplied by measurement merely by virtue of the words "recoverable as if it were an arrear of water-tax" in S. 169 (3). Mr. Coltman has contended that S. 212 provides a method of recovery. I do not agree with him. S. 212 imposes a charge; and unless you have got a charge, you cannot take steps to enforce that charge. This being a charging Act, I think it must be construed strictly. It would have been quite easy to provide in the Act that the charge for water supplied by measurement should be deemed to be a property-tax, or should be upon the same footing as a water-tax, with which S. 140 deals. There is no such provision in the Act. I do not think we are justified, therefore, in treating the charge for water supplied by measurement as a water-tax, when the Act merely states that sums payable on account of such water shall be recoverable "as if it were an arrear of water-tax." Accordingly, I think that the appellants fail in their contention that there is a charge on the premises in respect of the water supplied

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by measurement, and that this appeal fails upon that point.

As regards the question of personal liability, I agree that the water supplied by meter must be treated as apportionable de die in diem. That being so, it seems to me to be plain that defendant 3 incurred no liability until he became the owner of the premises. He has been content to take 18th August 1930 as the date from which his liability commenced, and it has been conceded that the sum of Rs. 75 paid by him into Court is sufficient to discharge his personal liability upon the footing that the amount is apportionable. I agree, therefore, that on both the points, this appeal fails and must be dismissed with costs.

B.D./R.K. *Appeal dismissed.*

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* * A. I. R. 1936 Bombay 52

Full Bench

BEAUMONT, C. J., BROOMFIELD AND N. J. WADIA, JJ.

Puttan Hassan and *another*—Accused.

v.

Emperor—Opposite Party.

Criminal Case No. 17 of 1935, Decided on 19th November 1935.

* * **(a) Jury—Charge to jury—Court must charge jury and for so doing sum up evidence and lay down law—Court must sum up evidence whether jury desire it or not.**

It is mandatory upon the Judge to charge the jury, and in so doing to sum up the evidence for the prosecution and the defence and to lay down the law. The object of requiring the Judge to sum up the evidence is that he may render such assistance as he can to the jury by pointing out to them the salient evidence for both the prosecution and for the defence. It is not necessary for him to read his notes of the evidence to the jury, though it may often be desirable to read his notes of important parts of the evidence; nor is it necessary for him to go through the whole of the evidence. But he ought to refer to the salient parts of the evidence. It is no doubt legitimate for a Judge to ask the jury whether they have a particular piece of evidence in mind, or whether it would help them for him to read his notes on the subject; but the Judge is bound to sum up the evidence whether or not the jury desire him to do so. [P 53 C 1]

* **(b) Letters Patent (Bombay), Cl. 26 — Review—Power of High Court to review under Cl. 26—Court is not bound to disregard verdict of jury whenever misdirection to jury is proved — Principles of S. 537, Criminal P. C., should be applied — No illegality in trial but only irregularity — Irregularity not causing miscarriage of justice nor prejudicing accused—Verdict should not be set aside.**

Clause 26, Letters Patent, does not entail that whenever any misdirection is found to exist the Court has no option but to set aside the verdict. To hold that the High Court is bound to set aside the verdict whenever any misdirection is proved would be to disregard the direction in Cl. 26, that the High Court is to review the case. It is clear from the wording of Criminal P. C., S. 537, that it does not apply to a case dealt with under Cl. 26, Letters Patent. But to such a case coming under Cl. 26, Letters Patent, the principle which underlies S. 537 should be applied and so where there has been no illegality in the mode of trial, but some irregularity in the process of trial, the High Court is not entitled to set aside the verdict or judgment unless it is satisfied that that irregularity has led to a miscarriage of justice, or has prejudiced the accused: 25 *Mad* 61 (*P C*), *Ref.*; 1927 *P C* 44, *Rel. on.* [P 53 C 2]

(c) Jury—Misdirection—Court should consider effect of misdirection on jury which is competent and yet consisting of laymen.

It is open to the High Court to consider, not so much what effect the misdirection has upon the minds of the Judges of High Court sitting in place of a jury, but what the effect of the misdirection was or may have been upon the minds of the jury which tried the case; and in so doing the Court must assume that the jury was a reasonably competent jury, though it must remember that a jury consists of laymen, and that a misdirection may have more effect upon the minds of laymen than upon the mind of a trained Judge. [P 54 C 1]

(d) Evidence — Discrepancies — Effect of minor discrepancies is to strengthen a case.

Minor discrepancies rather tend to strengthen, than to weaken, the evidence, because they suggest that the witnesses have not learnt the same story off by heart. [P 54 C 2]

(e) Letters Patent (Bombay), Cl. 26 — It contemplates final disposal and no order of new trial.

Clause 26 contemplates a final disposal of the case by the High Court and there can be no order of a new trial: 1920 *Cal* 500, *Rel. on.* [P 56 C 1]

A. J. Poonawalla—for Accused.

S. G. Velinker and *F. G. R. Khairaz*—for the Crown.

Beaumont, C. J.—This is a petition to the Court to review the conviction of the accused of the offence of murder by the Bombay Sessions Court and the sentence of death passed upon him, the petition being based on a certificate of the Advocate-General given under Cl. 26, Letters Patent. The certificate granted by the Advocate-General is that in his judgment the question whether the direction to the jury by the learned Judge in this case and the omission to direct the jury do not amount in law to a misdirection should be further considered by the Court. The basis of the petition for review is therefore that there were misdirections and omissions in the summing

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up of the learned Judge which amount to error in a point of law.

Section 297, Criminal P. C., provides that in cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided. It is therefore mandatory upon the Judge to charge the jury, and in so doing, to sum up the evidence for the prosecution and the defence and to lay down the law. The object of requiring the Judge to sum up the evidence is that he may render such assistance as he can to the jury by pointing out to them the salient evidence for both the prosecution and for the defence. It is not necessary for him to read his notes of the evidence to the jury, though it may often be desirable to read his notes of important parts of the evidence: nor is it necessary for him to go through the whole of the evidence. But he ought to refer to the salient parts of the evidence. Now what the learned Judge did in this case was that he first laid down certain general rules for the guidance of the jury in appreciating the evidence, and no exception is taken to that part of the charge. He also dealt with the law relating to murder, and it is not suggested that he gave any misdirection in his statement of the law, although it is suggested that his direction did not go far enough, in that he omitted reference to the Exceptions to S. 300, I. P. C. He then asked the jury whether they desired him to read out his notes of any part of the evidence, and on the jury saying that they did not so desire, the learned Judge really did not deal at all with the evidence.

It is no doubt legitimate for a Judge to ask the jury whether they have a particular piece of evidence in mind, or whether it would help them for him to read his notes on the subject; but the Judge is bound to sum up the evidence, whether or not the jury desire him to do so. The learned Judge made some general observations about the nature of the prosecution case; he referred to the fact that there were discrepancies in the evidence, though he did not allude to any particular discrepancy, and he referred generally to the defence suggested in the cross-examination of the prosecution witnesses. But it is impossible to say, in my opinion, that he summed up the evidence to the jury, and as the learned Judge omitted to sum up the evidence to the jury and failed to comply with S. 297, it is, in my opinion, established that there is an error of law which brings the case within Cl. 26, Letters Patent.

The next point to consider is what our powers are in dealing with a case under Cl. 26, Letters Patent. That clause provides that on its being certified by the Advocate-General that in his judgment there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right. It was admitted by Mr. Poonawalla, on behalf of the accused, and I think quite rightly admitted, that the clause does not entail that whenever any misdirection is found to exist the Court has no option but to set aside the verdict. To hold that we are bound to set aside the verdict whenever any misdirection is proved would be to disregard the direction in the section that we are to review the case. It is clear, I think, from the wording of S. 537, Criminal P. C., that it does not apply to a case dealt with under Cl. 26, Letters Patent. But, in my opinion, we ought to apply to such a case the principle which underlies that section, that is, that where there has been no illegality in the mode of trial, but some irregularity in the process of trial, we are not entitled to set aside the verdict or judgment unless we are satisfied that that irregularity has led to a miscarriage of justice, or has prejudiced the accused. Mr. Velinker for the Crown has relied on the decision of a Full Bench of this Court, which is not reported: Criminal Case No. 20 of 1902 (1), where the judgment is in these terms:

1. Emperor v. Leherchand Dayachand, Criminal Case No. 20 of 1902, decided by Jenkins, C. J., Tyabji, Russell, Crowe and Batty, JJ. (F B).

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Though our decision on some of the points raised by the Advocate-General must be in the accused's favour that does not entitle us to dispose of the case by simply quashing the conviction. For this Court to deal with the case now de novo no doubt transfers from the jury to this Court the determination of the question whether the legal evidence in the case is sufficient to support a conviction against each of the accused, but the authorities are conclusive that Cl. 26, Letters Patent, casts upon us that duty.

It is, in my opinion, not necessary for us in this case to go as far as the Court went in that case, or to consider how far that ruling is in accordance with certain views of the Privy Council expressed in the well-known case of 25 Mad 61 (2). It is, in my judgment, clearly open to the Court to consider, not so much what effect the misdirection has upon the minds of this Court sitting in place of a jury, but what the effect of the misdirection was or may have been upon the minds of the jury which tried the case; and in so doing we must, I think, assume that the jury was a reasonably competent jury, though we must remember that a jury consists of laymen, and that a misdirection may have more effect upon the minds of laymen than upon the mind of a trained Judge. In order to determine that question it is, of course, necessary to consider the evidence on the record, and we have been through the whole of the evidence. (After discussing the evidence in the case his Lordship proceeded.) The broad points, on which Mr. Poonawalla relies to establish that there was a misdirection which prejudiced the accused, are first of all, that the Judge should have referred to the evidence in the case. I agree that he should have done so, but having regard to the nature of the evidence, I think that the Judge's omission to refer to it was really favourable to the accused. In my view the more the Judge had referred to the evidence, the worse it would have been for the accused. Then it is said that the Judge should have pointed out the discrepancies between the stories of the different eye-witnesses and the discrepancies between the stories which the several witnesses told in the Sessions Court and the stories the same witnesses had told in the Committing Magistrate's Court. Counsel had of course referred to those discrepancies. The Judge's duty would be to refer to any material discrepancy, but in my opinion there were here no such serious discrepancies as made it necessary for the Judge specifically to deal with them.

The learned Judge did refer to the fact of there being discrepancies in the evidence, and he pointed out quite truly that minor discrepancies rather tend to strengthen, than to weaken, the evidence, because they suggest that the witnesses have not learnt the same story off by heart. In my opinion there was no failure of justice in the omission of the Judge to deal with the particular minor discrepancies which were shown to exist in the evidence. Then it is said that the Judge did not refer to the fact that there were matters favourable to the accused, for instance that there were no blood-stains found on their clothes, no blood-stained knife found with the accused, and no injury on the person of the present petitioner. Well, all those are negative matters which, in my opinion, it was not essential for the Judge to refer to. The points were again all before the jury, and they may well have thought that, inasmuch as the present petitioner was not arrested until three days after the assault, the fact that no blood-stains were found on his clothes and no incriminating weapon found with him was very easily explained. Then a great point is made of the fact that the learned Judge did not refer to any of the Exceptions to S. 300, I. P. C., and it is suggested that the defence might have brought the case within the 1st or 4th Exception. Admittedly, counsel for the petitioner did not himself read those exceptions to the jury, and if the learned Judge had read the Exceptions, it would have been necessary for him, in my opinion, to tell the jury as a matter of law that there was no evidence on which they could bring the case within either of those Exceptions. If that is so, there was clearly no miscarriage of justice in the Judge not reading Exceptions which did not apply.

The Exception principally relied on in this Court is the 4th Exception, which provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner. The defence case, as suggested in cross-examination, was that the

2. Subrahmania Ayyar v. Emperor, (1901) 25 Mad 61=28 I A 257=8 Sar 160 (PC).

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deceased Ramzanbux had told the accused that they were not to come to Pannabai's room. They had, on Pannabai's own admission, been harassing her, and she was frightened of them and wanted them not to come to her room, and as Ramzanbux was a rent-collector and was responsible for letting Pannabai's room to her, it no doubt is quite a possible theory that he told the petitioner that he was not to come to her room and frighten her. Then the defence theory is that Ramzanbux, when the accused came in, told them to go away and started to fight with a stick. Admittedly, he was not armed with any knife. There is absolutely no evidence whatever in support of that story. The learned Judge did refer to it as a possible theory, and counsel quite rightly put that theory in cross-examination of the prosecution witnesses, but no witness accepted that theory as correct. They all said that was not what happened, and merely to put a theory to witnesses, who reject it, does not provide any evidence of the truth of the theory. That being so, in my opinion, in law there was no evidence on which the jury could have held that the case fell within either Exception, and the Judge would of course have had to warn the jury that the burden of bringing himself within one of the Exceptions rested on the accused.

In my opinion, although there was a failure to comply with S. 297, Criminal P. C., and that failure does amount to an error in law, that failure has not led to any miscarriage of justice, and has not in any way prejudiced the accuseed; and that being so, I am of opinion that we should dismiss the petition.

Broomfield, J.—I agree, and I shall state my reasons as briefly as possible. S. 297, Criminal P. C., requires the Judge to sum up the evidence for the prosecution and the defence and to lay down the law. A proper summing up by the Judge is an essential part of the system of trial by jury prescribed by the Code, and except where the facts are admitted a proper summing up should include a summary of the case for the prosecution and the case for the defence, and some reference to the actual depositions of the witnesses with appropriate comment or criticism. Material discrepancies in the evidence should also be pointed out. The amount of detail necessary must obviously depend on the nature of the case. It has to be remembered that the jury, who are the judges of fact, have usually no record of the evidence on which they are to pronounce. The Judge has his notes and also the depositions taken before the Magistrate. The jury, as a rule, have nothing but their recollection of what the witnesses have stated. It is the Judge's duty, therefore to make sure that the essential facts deposed to, facts in issue and relevant facts, are fresh in the minds of the jury before they retire to consider the verdict. If there has been a very full discussion of the evidence at the Bar, the Judge's work is lightened, but he is not relieved of his duty, nor is he relieved of it by the opinion of the jury themselves, which may be unduly optimistic, that they are not in need of any reminder.

In the present case, as the learned Chief Justice says there has not really been any summing up of the evidence. There are only two short passages in this very long charge in which there is any specific reference to the evidence at all, and though, if I may say so with respect, the learned Judge's charge is quite admirable as a guide to the appreciation of oral evidence in the abstract, it was not calculated to give the jury very much practical assistance in dealing with the particular case before them. Then, as to laying down the law, the defence put forward on behalf of the accused apparently was that the injuries to Ramazanbux were caused in the course of a sudden quarrel in such circumstances that Ex. 4 to S. 300, I. P. C., might come into operation. That Exception was not specifically referred to by the learned counsel for the accused, but nevertheless, as it was fairly obvious that reference was made to that Exception, it should have been read out and explained by the Judge, although, as the learned Chief Justice has pointed out, if he had done so, it would also have been proper for him to explain that there was in fact no evidence to substantiate that defence. I think there has clearly been a non-direction by the learned trial Judge, which, in my opinion, amounts to misdirection within the meaning of Cl. 26 of the Letters Patent. The learned counsel for the Crown admits that that view is in accordance with the authorities. In any case, if there was not a misdirection, there was an error on a

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point of law and that would be sufficient to make Cl. 26 apply.

The question then arises, what is the consequence of our finding that there was a misdirection or an error in law in the summing up. Cl. 26 contemplates a final disposal of the case by this Court, and it has been held that there can be no new trial: 47 Cal 671 (3). On the other hand, S. 537, Criminal P. C., does not apply, so that our power to interfere is not limited by statute to cases where there has been a failure of justice. But I agree with the learned Chief Justice that the principle of that section may be applied, and if it appears that there has been no failure of justice, it is difficult to see why we should interfere with the verdict, unless indeed we are bound to do so. In the course of the arguments we were referred to 44 Cal 477 (4). Mookerjee, J., who was one of the Judges who decided that case, considered it to be an open question whether, after finding that there has been a misdirection of the jury, there is any option left to the Court except to set aside the conviction and acquit the accused. The learned Judge referred to several authorities, some of the Calcutta High Court and some of this Court, to the effect that it is competent to the Court to consider the whole case on the evidence and to pass such sentence as shall seem right. But he considered it a moot point whether those decisions could stand in view of the decision of the Privy Council in 25 Mad 61 (2). It may be doubted whether the decision of the Privy Council in that case goes as far as has sometimes been assumed. The case has been taken as an authority for the proposition that if there has been disobedience of a mandatory provision of the Code, that vitiates the whole trial, irrespective of the question whether there has been prejudice to the accused. But there is nothing in the judgment which really goes as far as that, and the Privy Council themselves have referred to 25 Mad 61 (2) in a later judgment, 54 I A 96 (5), in such a way as to suggest that the question whether there has been a failure of justice is always a relevant consideration. I may refer in that connection to 53 Mad 937 (6).

In any case the extreme view has not been pressed before us. The learned counsel for the accused, if I understand his argument correctly, does not dispute the power of this Court to pass such order as the justice of the case requires, though he argues that in the circumstances of this case the judgment should be either one of acquittal or of conviction of culpable homicide not amounting to murder. His argument seems to be really this: if there has been a misdirection, it may be assumed that the verdict has been affected : if the evidence has not been properly summed up, it is possible that if it had been properly summed up the jury would have been less influenced by points in favour of the prosecution and more influenced by points in favour of the defence. If the law bearing on the defence has not been explained it is possible that if it had been explained the jury might have accepted the defence; and if there is any possibility that the jury might have decided otherwise than they did, whether reasonably or not, the accused should have the benefit of that chance. But I do not think there is any authority for this proposition even in the cases on which Mr. Poonawalla has relied. It may be going too far to say that the whole case is open to us and that we are at liberty to substitute our own judgment for the jury, though there is respectable authority even for that view. But, in any case, I think that the criterion must be, not what the jury might conceivably have held, but what it might have reasonably held if properly charged by the Judge. There is nothing strange or illogical in such a view of our powers or duty. The High Court has constantly to place itself in the position of the jury in this sense in appeals from juries' verdicts and in references under S. 307, and I entirely agree with the learned Chief Justice that on the evidence in this case there is not the slightest reason to believe that there has been any failure of justice, and that the petition should be dismissed.

N. J. Wadia, J.—It has not been alleged that there has been any actual mis-

3. Emperor v. Panchu Das, 1920 Cal 500=58 I C 925=21 Cr L J 849=47 Cal 671=31 C L J 402=24 C W N 501 (F B).
4. Emperor v. Fateh Chand Agarwala, 1917 Cal 123=38 I C 945=44 Cal 477=18 Cr L J 385 =24 C L J 400=21 C W N 33 (F B).
5. Abdul Rahman v. Emperor, 1927 P C 44=100 I C 227=54 I A 96=5 Rang 53 (P C).
6. Ramaraja Tevan, In re, 1930 Mad 857=1930 Cr C 1033=127 I C 654=32 Cr L J 30=53 Mad 937=59 M L J 945.

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direction in this case, and no objection has been taken to the exposition of the law by the learned Judge. The case is one entirely of non-direction. It is alleged that the failure of the learned Judge to refer to the evidence of the more important witnesses in detail, to discuss it and to point out the discrepancies in it, his failure to explain what the defence of the accused was, and to point out that the accused relied on Exceptions 1 and 4 to S. 300, Penal Code, and to read out and explain those exceptions to the jury was such serious non-direction as would amount to misdirection. To amount to misdirection the non-direction must be such as must have misled the jury and seriously prejudiced the accused and thus resulted in a failure of justice. Although it is true that as the case had been heard by the jury for five days their recollection of the evidence could not have been very fresh, the evidence had admittedly been put before the jury in detail by the learned Advocate-General and by the two counsel who appeared for the two accused. This is a fact which must be borne in mind when considering how far the jury could have been misled or prejudiced by the omission to put or discuss the evidence in detail in the charge. I think that in the circumstances of the case the mere omission to go through or comment on the evidence did not mislead the jury.

The learned Judge at two places in his charge pointedly asked the jury whether they desired him to read out the evidence in detail, and was told by them that they did not. Even so, however, the omission to refer to certain discrepancies on material points, especially with regard to the number of persons concerned in the offence, was a serious omission, and would, I consider, amount to misdirection. It was contended that the accused had nowhere expressly pleaded that his case came within the purview of either Exception 1 or Exception 4 to S. 300, Penal Code, and looking merely at the statement of the accused, that appears to be correct. But there was, in my opinion, sufficient indication in the cross-examination of the prosecution witnesses to suggest that it was the accused's case that there had been some provocation offered to accused No. 1 or to the members of his party by Ramzanbux, and also that the attack on Ramzanbux was not the act of the accused alone or of any one member of his party, but that there had been a general fight between the party of the accused and that of Ramzanbux. There was an indication therefore that reliance was being placed on Exceptions 1 and 4 to S. 300, and in the arguments of the learned counsel for the first accused it had been contended that it was not a case of murder in cold blood, but of death resulting from a sudden quarrel, and that the offence, if any, would be one not of murder, but of culpable homicide not amounting to murder. In these circumstances it was, I think, clearly necessary for the learned Judge to refer in his charge to Exceptions 1 and 4 to S. 300, and to explain them to the jury, and his failure to do so amounts to misdirection.

Assuming that there has been misdirection, the question is what the powers of this Court acting under Cl. 26, Letters Patent, are. We have clearly no power to order a re-trial. The language of the clause requires that the case must be finally decided. It has been held by this Court and also by the Calcutta High Court that where the Court on review decides in favour of the accused on the point of law on which the certificate has been granted by the Advocate-General, it is open to the Court to consider the whole case on the evidence and to pass such sentence as shall seem right. The question whether the view taken by this Court and the Calcutta High Court had been overruled by the decision of the Privy Council in 25 Mad 61 (2) was considered by the Calcutta High Court in 44 Cal 477 (4) and again in 47 Cal 671 (3), and although in the first case the question was left open, in the later case it was decided by a Full Bench that the Court has power under Cl. 26, Letters Patent, to examine the evidence and to determine after the exclusion of the inadmissible evidence whether the residue is sufficient to justify a conviction, and two of the learned Judges were of opinion that the Privy Council ruling in 25 Mad 61 (2) had not overruled the view which the Calcutta High Court and the Bombay High Court had previously taken. Mr. Poonawala, who appears for the accused, has conceded that if this Court thinks that there was misdirection it would be the duty of the Court to place itself as far as possible in the posi-

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tion of the jury and decide what they would have done if properly directed. In my view we have the power to consider the evidence and to decide whether as a result of the misdirection there has been a failure of justice, and whether if there had been no misdirection, the jury could have come to a different verdict.

I have already expressed my view that the omission to refer to and to discuss the evidence in detail was not, in the circumstances of the case, a very serious omission, and could not have misled the jury. The relevant portions of the evidence had been already placed before the jury by the learned Advocate-General and by the two counsel for the accused, and must have been fresh in their minds. There were undoubtedly certain discrepancies in the statements of some of the witnesses and especially in the statements made by the murdered man, Ramzanbux, and by his brother very soon after the offence. Although these were not specifically referred to, it cannot be said that they were not referred to at all, or that the jury's attention had not in any way been directed to them. The learned Judge expressly asked the jury to consider whether the fact that in each of the statements made by the different witnesses, from the very start the name of accused No. 1 was always mentioned first, would weigh with them so as to overweigh the other fact that in some cases the names of other persons were added to those of accused 1 and 2. He also pointed out to them that in the first instance six persons were implicated, then four persons, and then in the Sessions Court, only two, and he asked them to weigh these discrepancies and to pronounce whether the addition of the names besides the two at various times could be explained in any way consistent with the truth of the prosecution case. At another place in the charge he again asked them to go into the details very carefully, and to consider whether they thought that second fact, that others were mentioned together with the accused, would make them discard those statements and pay no heed to the fact that from the very start these two persons, viz., the two accused, had been mentioned as responsible for the death of Ramzanbux. The existence of the discrepancies, therefore, was pointedly brought to the notice of the jury and sufficiently stressed. It would certainly have been better if the actual statements made by Ramzanbux at different times and by some of the prosecution witnesses with regard to the number of persons concerned in the offence had been read out. But the reference made to the discrepancies was, in my opinion, sufficient to direct the jury's attention to the existence and seriousness of the discrepancies, and it cannot therefore, in my opinion, be said that the omission to refer specifically to the discrepancies had seriously misled the jury or had occasioned a failure of justice.

The defence put forward by the accused was also referred to. It was pointed out that the defence had argued that there must have been some kind of provocation, and that it was alleged, and questions were put to witnesses indicating that the deceased must have told the accused and their party to leave Pannabai's hall, that he must have done so rudely, that angry words must have been exchanged, and a quarrel had arisen, and in the heat of that quarrel somebody struck, and that there was not sufficient evidence before the jury to find out who struck the blow, nor was the evidence sufficient to find that the person who struck the blow did it with the intention of killing. Here again, it was, in my opinion, incumbent on the Judge to point out to the jury that the accused relied on Exceptions 1 and 4 to S. 300, and to read out and explain those exceptions to them. But I agree that the omission to do so has not occasioned a failure of justice. There was clearly no evidence whatsoever which could have enabled the accused to prove that their case fell either under Exception 1 or Exception 4, and if the Judge had referred to these Exceptions, it would also have been his duty to mention that the burden of proving that their case fell within the Exceptions was upon the accused, and that they had failed completely to discharge that burden. It cannot therefore be said that the accused has been prejudiced by the omission of the learned Judge to refer specifically to Exceptions 1 and 4 in his charge. I agree therefore that no failure of justice has occurred, and that the petition must be dismissed.

B.D./R.K. *Petition dismissed.*

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** A. I. R. 1936 Bombay 59

Full Bench

BEAUMONT, C. J., N. J. WADIA AND DIVATIA, JJ.

Dhondo Yeshvant Kulkarni — Defendant—Applicant.

v.

Mishrilal Surajmal—Plaintiff—Opposite Party.

Civil Revn. No. 495 of 1934, Decided on 23rd August 1935, against decree of First Class Sub-Judge, Dhulia, in Sm. C. S. No. 4635 of 1933.

(a) Precedent — Lower Court is bound to follow High Court's ruling until it is overruled.

Whatever its opinion, lower Court is bound to follow a decision of the High Court so long as it has not been over-ruled. [P 59 C 2]

****(b) Hindu Law—Reversioner — No distinction between secured and unsecured debts for legal necessity—Estate in hands of reversioner is bound for debts though unsecured but for necessity** : 52 *Bom* 542=111 *I C* 704=1928 *Bom* 310 and 3 *Bom* 237, *Overruled.*

There is no warrant in Hindu Law for making a distinction between secured and unsecured debts provided they are both for legal necessity. [P 61 C 2]

Where the widow incurs the necessary liability in her character as such, i. e., as representing the husband's estate, the intention of binding the estate as opposed to binding herself alone is to be implied because the reversioner's obligation depends on the purpose of the debt rather than on the intention of the parties contracting it. [P 62 C 1]

Where a widow incurs a debt for a legal necessity and executes a pro-note in favour of her creditor, the estate in the hands of her reversioner will be bound for the loan so taken on pro-note : 26 *Bom* 206 (*FB*), *Applied*; 52 *Bom* 542=111 *I C* 704=1928 *Bom* 310 and 3 *Bom* 237, **Overruled**; 4 *Mad* 375; 19 *All* 300 and 30 *All* 394, *Dissent.*; 6 *Cal* 36 and 10 *Cal* 823 (*FB*), *Foll.* [P 59 C 1; P 62 C 1]

G. B. Chitale—for Applicant.

H. B. Gumaste—for Opposite Party.

Divatia, J.—The question arising for decision in this case is whether the estate in the hands of a reversioner is bound by an unsecured debt contracted by a Hindu widow as representing the estate for legal necessity. It arises in this way. The plaintiff brought a suit on the Small Cause side of the First Class Subordinate Judge's Court at Dhulia on a promissory note passed by a Hindu widow in his favour. The widow having died, the suit is brought against the reversioner to recover the amount due from the estate of the widow's husband in his possession. The lower Court found that the debt under the promissory note was incurred by the widow for cultivation of her husband's lands and for payment to the servants working on the said lands, and it proceeded on the basis that it was for a purpose constituting legal necessity. The defendant contended that the debt cannot be realised from the property in his hands, and relied on a recent decision of this Court in 52 Bom 542 (1), to the effect that under the Hindu law the property in the hands of a reversioner is not liable to satisfy a personal debt not secured on such property which a widow while enjoying a widow's estate has properly incurred in the course of management of the property. This decision, so far as it went, was a sufficient answer to the suit, but the learned Judge thought that it was contrary to a previous decision of the Privy Council in 36 I A 138 (2), and he therefore refused to follow it and passed a decree in the plaintiff's favour. In doing so, we think the learned Judge fell into a double error. He did not notice that the Privy Council case was distinguishable inasmuch as it was a case of an alienation by the widow while the present case was one of an unsecured debt incurred by her. Secondly, whatever his own opinion, he was bound to follow a decision of this Court so long as it was not overruled. Being aggrieved by this decision, the defendant has filed this revisional application, and it was contended on his behalf that the plaintiff's suit should have been dismissed in view of the clear authority of this Court against him. It was however urged on behalf of the plaintiff that the decision in 52 Bom 542 (1) is incorrect and that there is a previous Full Bench decision of this Court in 26 Bom 206 (3), which proceeds upon certain principles which are inconsistent with that decision, and that there are rulings of other High Courts also which are against the view in 52 Bom 542 (1). In view of this conflict and also of the general importance of the point, the question stated above has been referred to this Bench.

1. Bhagwantrao Abaji v. Ramanath Kaniram, 1928 Bom 310=111 I C 704=52 Bom 542=30 Bom L R 881.
2. Karim-ud-Din v. Gobind Krishna Narain, (1909) 31 All 497=36 IA 138=6 ALJ 807(PC).
3. Sakrabhai v. Maganlal, (1901) 26 Bom 206=3 Bom L R 738 (FB).

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It is clear that under the the Hindu law an alienation by a widow of her husband's property for legal necessity is binding on the reversioner. So also a decree fairly and properly obtained against her in regard to that property is, in the absence of fraud or collusion, binding on him, and this is so in spite of the fact that the reversioner does not claim through the widow but takes the property as heir of the last male owner. The reason is that the widow is not merely a life-tenant but an owner with certain restricted powers to incur debts and even to dispose of the property for legal necessity, and in cases governed by the Mayukha in our Presidency, with full powers of disposition over the moveables by acts inter vivos. Now, it is a cardinal principle of Hindu law that he who takes the estate is subject to the obligation of paying its just debts. About decretal debts and secured debts for legal necessity there is no doubt as to their binding nature on the property in the hands of the reversioner, but a difference of opinion exists with regard to unsecured debts even though they may be legally justifiable on the ground of necessity. One view is that such debts are not binding on the estate because they involve only personal liability of the widow while the other view is that they are so binding provided the widow incurs them in her representative capacity and as laid down in some cases, provided the evidence makes it clear that the lender looked to the credit of the estate and not to the personal credit of the widow. About one class of unsecured debts, however, there seems to be general agreement that they are so binding, and those debts are what are known as trade debts, i. e., debts ordinarily incurred by a widow in the course of the management of a business concern inherited by her. That proceeds on the basis that when she incurs such debts the presumption is that the creditor looks to the credit of the assets of the business and not to her personal credit, and therefore although no specific charge is created, the credit of the business is impliedly pledged: 26 Bom 206 (3) and 42 All 109 (4).

What then is the reason for this distinction? It is clear that no distinction between secured and unsecured debts or decretal and non-decretal debts exists in the ancient Hindu law texts. As observed by Sir Lawrence Jenkins, C. J., in the Full Bench case in 26 Bom 206 (3), after quoting and discussing these texts, they do not attribute a more binding operation to a debt secured by a specific charge than to one not so secured, and that the texts appear to be opposed to alienations of the family property though at the same time the payment of debts incurred by others is distinctly recognized and enjoined. According to the texts it is legal necessity that is the touchstone for testing the binding nature of a transaction by a manager, a widow or a guardian. It is true that if the debt is a secured or a decretal debt, its character can be more easily and definitely ascertained than if it were an ordinary loan or a bond, but its obligatory character on the reversioner does not depend upon the maner of incurring it, but on its purpose. But although the texts are silent, some of the decided cases have made out this distinction, and it is therefore necessary to see whether it is well founded on principle. The distinction is in some cases stated to be that where the creditor does not obtain a charge on property, but only accepts the personal credit of the widow, that does not bind the reversionary estate as the obligation created is in personam and not in rem. Therefore, if the estate in the reversioner's hands is to be made liable, the property itself must be charged. That is the distinction on which the cases of 3 Bom 237 (5), 4 Mad 375 (6), 19 All 300 (7) and 30 All 394 (8) proceed, and the principle of these decisions is followed in 52 Bom 542 (1). In our opinion this distinction turns upon an erroneous view of the nature of a Hindu widow's estate. As is well expressed by Golapchandra Sarkar Sastri in his Hindu Law, Edn. 7, p. 817:

> The estate is fully vested in her in the same way as if the husband lived in her, the distinction being that her power of alienation and of charging the estate for debts is qualified. If the

4. Pahalwan Singh v. Jiwan Das, 1920 All 345=59 I C 162=42 All 109=18 A L J 41.

5. Gadgeppa Desai v. Apaji Jiwanrao, (1879) 3 Bom 237.
6. Ramasami Mudaliar v. Sellattammal, (1881) 4 Mad 375.
7. Dhiraj Singh v. Manga Ram, (1897) 19 All 300=1897 A W N 69.
8. Kallu v. Faiyaz Ali Khan, (1908) 30 All 394=5 A L J 367=1908 A W N 173.

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debts contracted by her are lawful, then the same consequences should follow as if the same were the husband's debts, that is to say, the debts should be a charge on the estate in the hands of the reversioner who must be deemed to be the heir of the widow representing the husband, and as such liable to pay the lawful debts. The reversioner cannot succeed in most cases except upon the theory that the husband lives in the widow, and dies when she dies. It appears to be perfectly reasonable and equitable that his liability should be determined by the same theory which forms the foundation of his right, he being entitled to the residue left after meeting the widow's lawful expenses.

In 52 Bom 542 (1) the decision of the Full Bench of this Court in 26 Bom 206 (3) is distinguished from the decision in 3 Bom 237 (5) which has been followed. The ground of distinction is that, in the former case, the debt was a trade debt which though unsecured was held binding on the reversioner, while in the latter case the debt was an ordinary one on a bond. Although the Full Bench decision was confined to trade debts, it contains a general discussion about the liability of the reversioner for unsecured debts and these observations, in our opinion correctly interpret the Hindu law when it is said that there is no warrant for the doctrine which would lend a more binding value to a secured debt. Indeed, it seems to us that most of the reasons given by Sir Lawrence Jenkins, C. J., in that case regarding the binding nature of trade debts on the reversioner would equally apply to other debts for legal necessity contracted by the widow. So far as the reversioner is concerned, we do not think there is any difference in principle between a debt incurred by a widow in conducting the family trade or business and a debt incurred by her in managing the property left by her husband or in carrying on his avocation. Both may involve paying and receiving as well as borrowing monies though in different degrees. It may be that in trade one may require to borrow monies more often, but that does not appear to be a sufficient reason why the reversioner is bound in the case of one and not of the other. It is not the nature of the property but the nature of the debt that determines the liability of the reversioner. Suppose an estate in the widow's hands consists of a big rent-fetching property. That may involve as many items of receipt and expenditure as a family business. Why should it be said that in one case the lender looks to the credit of the business for satisfying his unsecured loans, and in the other case he does not or is not presumed to look to the credit of the rent-fetching estate unless the contrary is proved?

We are of opinion that there is no warrant in Hindu law for making a distinction between secured and unsecured debts provided they are both for legal necessity. We prefer the reasons given in the Full Bench case of 26 Bom 206 (3) on this point to those in 3 Bom 237 (5) and we think that in so far as the latter decision rests on such distinction it is not correct. It follows that the decision in 52 Bom 542 (1) which follows 3 Bom 237 (5) on this point is also not correct. For the same reasons the decisions in 6 Cal 36 (9) and 10 Cal 823 (10) seem to us to be good law, and those in 4 Mad 375 (6), 19 All 300 (7) and 30 All 394 (8) are erroneous. In some cases the extreme view taken in these decisions has been modified and it is held that where the intention of the contracting parties is that the estate was to be bound, it would remain liable in the reversioner's hands although it was not charged, and it would be otherwise where the widow intended to bind herself alone, and that such intention can be gathered from the statements in the deed, if any, or from the surrounding circumstances: 20 C L J 23 (11), 33 Mad 492 (12), 34 Mad 188 (13) and 35 Mad 108 (14). It is nevertheless recognized in the first of these cases by Mookerjee, J., that there is no real distinction in principle between a case where a charge is formally created by a widow and another where she executes a bond for the money advanced, although where a charge is created, there may be surer indication of her intention to make the estate liable than where she had executed a promissory note; but once the intention was established, the effect of the act must depend upon the nature of the debt recoverable from the estate in

9. Ramcoomar Mitter v. Ichamoyi Dasi, (1880) 6 Cal 36=6 C L R 429.
10. Hurry Mohan Roy v. Gonesh Chunder Doss, (1884) 10 Cal 823 (F B).
11. Rameswar Mandal v. Provabati Debi, 1915 Cal 141=25 I C 84=20 C L J 23=19 C W N 313.
12. Jogayya v. Venkataratnamma, (1910) 33 Mad 492=5 I C 271.
13. Weerabadra Aiyar v. Marudaga Nachier, (1911) 34 Mad 188=8 I C 1072.
14. Maharaja of Bobbili v. Zamindar of Chundi, (1912) 35 Mad 108=8 I C 860.

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the reversioner's hands—if it had been incurred for necessary purposes.

We are of opinion that where the widow incurs the necessary liability in her character as such, i. e., as representing the husband's estate, the intention of binding the estate as opposed to binding herself alone is to be implied, because as we have observed before, the reversioner's obligation depends on the purpose of the debt rather than on the intention of the parties contracting it. Definite evidence would be necessary to prove an agreement confining the liability to the widow's personal capacity.

Our answer therefore to the question referred is in the affirmative.

B.D./R.K. *Reference answered.*

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BEAUMONT, C. J. AND B. J. WADIA, J.

T. R. Pratt (Bombay) Ltd.—Appellant.

v.

E. D. Sassoon & Co., Ltd. and *another* Respondents.

O. C. J. Appeal No. 36 of 1934, Decided on 18th September 1935, from the judgment of Kania, J.

(a) Companies Act (1913), Sch. 1, Art. 73—Power of director—Meaning of words "for the time being" in Art. 73.

Article 73, Companies Act, Sch. 1 is the relevant article to be considered on the point of powers of directors in borrowing loan. The words "for the time being" in Art. 73 do not mean "when the claim is made." The Article in terms fixes the limit at any time. [P 63 C 2]

(b) Principal and Agent—Joint stock company having unlimited power to borrow—Director borrowing money without authority—Money used by company—Promise to repay is implied.

When an agent borrows money for a principal, without the authority of the principal but the principal takes the benefit of the money so borrowed or the money so borrowed has gone into the coffers of the principal, the law implies a promise to repay. The lender has not advanced the money as a gift, but has given them as a loan and the principal having received the benefit of the money, the law implies a promise to repay. There appears to be nothing in law which makes this principle inapplicable to the case of a joint stock company when the borrowing power of the company itself is unlimited. The position would be that the principal (the company) through its agents (the directors or the managing agents) had borrowed money which the principal had not authorized the agents to borrow. However the money having been borrowed and used for the benefit of the principal, either in paying its debts or for its legitimate business, the company cannot repudiate its liability to repay on the ground that the agents had no authority from the company to borrow. When these facts are established a claim on the footing of money had and received would be maintainable. [P 66 C 1]

(c) Principal and Agent — Ratification — Party ratifying should be conscious that act beyond power has been committed—Party should consciously agree to be bound by overt act.

In order to establish a case of ratification it appears to be essential that the party ratifying should be conscious that an act beyond the authority of the agent had been done, and further after notice of that fact the party consciously by an overt act agreed to be bound by it or by acquiescence in the situation arising thereafter allowed the business to continue. In either event it appears that consciousness of the act done by the agent without authority must be proved, and secondly, it should be proved that, after notice of such unauthorized act, the principal adopted the transaction. [P 69 C 1]

(d) Evidence Act (1872), S. 114—Person capable of doing things within right or in excess of his power—Person supposed to do right thing when rights of third party affected.

When a man has power to do the right thing and does a thing which is capable of being taken either as the right thing or in excess of his power to do the right thing, it should be presumed that he had done the right thing, especially when the rights of third parties would be adversely affected on the other construction. [P 75 C 1]

(e) Company—Joint stock company is separate entity—It is not permissible to inquire whether one man or more hold all shares.

Under law a joint stock company is a distinct entity; and although all the shares may be practically controlled by one person in law, a company is a distinct entity and it is not permissible or relevant to inquire whether the directors belonged to the same family or whether it is, as compendiously described, a "one man company." [P 76 C 1]

(f) Deed—Validity—Arrangement carried out by one document is valid even if two documents are required.

To hold that an arrangement which could have been carried out by two documents cannot be carried out by one document to which all the parties interested are parties, would be to sacrifice substance to form. [P 78 C 2]

(g) Company — Contract by — People are fixed with notice of limitation of powers of company imposed by statute—What are questions of internal and external management discussed — Persons dealing with company have not to see whether company has put itself in position to exercise powers properly.

People dealing with a joint stock company are fixed with notice of any limitations of the power of the company contained in the statute under which it is incorporated or in the memorandum or articles of association; but if it is shown that a particular act was ostensibly authorized by the statute and the memorandum of articles of association, persons dealing with the company are not concerned to see that

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the company has put itself into a position to exercise its power properly. Outside parties are not concerned with the internal management of the company. They are not concerned to see that there was a proper quorum of directors present, or that persons who are apparently directors of the company had in fact been validly appointed. Those are matters of internal management. If the disability of a director to vote upon a contract in which he was personally interested were imposed by the articles of association, the question whether he was personally interested in, and entitled to vote upon, a particular contract would be regarded as matter of internal management, with which persons dealing with the company would not be concerned. The principle of the English law as to internal management ought to apply to a case of disability of directors arising under S. 91-B, Companies Act. The reason for the rule is that it would be disastrous in a business community if contracts made with companies could be impeached on account of matters known to the company but not to the other contracting party. [P 80 C 1, 2]

(h) Company—Knowledge of person who is officer of two companies — Knowledge acquired of one company when should be imputed to other company.

Where one person is an officer of two companies, his personal knowledge is not necessarily the knowledge of both the companies. The knowledge which he has acquired as officer of one company will not be imputed to the other company unless he has some duty imposed on him to communicate his knowledge to the company sought to be affected by the notice, and some duty imposed on him by that company to receive the notice; and if the common officer has been guilty of fraud, or even irregularity, the Court will not draw the inference that he has fulfilled these duties. [P 81 C 1]

(i) Company—Appointment of directors is matter of internal management.

Notwithstanding S. 87, Companies Act, the appointment of directors is still a matter of the internal management of the company, and an outsider cannot be expected also to search the register for the list of directors. [P 86 C 2]

F. J. Coltman and *M. L. Manekshaw*—for Appellant.

K. M. Munshi and *M. C. Setalvad*—for Respondents 1 and 2.

Kania, J.—The first question which arises is as to the power of the company and its directors to borrow the money from M. T. Ltd. From the memorandum of association of the company it is clear that there is no limit to the borrowing power of the company as such for its business. The terms of Cl. 3 (f) further authorize the company to mortgage any property or to secure the re-payment of any money borrowed by it in any manner as the company should think fit. As to the power of the directors to borrow money the matter has become complicated because certain articles of association were drawn up when the company was formed, and under which the directors were given very wide and general powers, but these articles were not filed with the Registrar, with the result that the articles of association contained in the Schedule to the Indian Companies Act govern the company. Art. 73 is the relevant article to be considered on this point. That article runs as follows:

> The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not at any time exceed the issued share capital of the company without the sanction of the company in general meeting.

The question for consideration is what is the proper construction of this article. It is contended on behalf of Sassoons that the words "for the time being" mean "when the claim is made." It is contended that whatever be the initial borrowing by the directors that is not a matter to be inquired into by the Court. I do not think the terms of the article justify such a narrow construction. The article in terms fixes the limit at any time and although the validity of the claim may have to be considered in respect of the amount claimed on the date of liquidation. I am unable to consider that the article in terms refers only to that point of time and no other.

On behalf of the claimants it is contended that the article authorises the directors to borrow money and the company as such has unlimited power of borrowing. Therefore, when the directors borrow money in excess of the amount of the issued capital, the lender is entitled to presume that the necessary formalities authorizing the directors to borrow money have been gone through, and the question of going through such formalities is a matter of internal management of the company. In this connection strong reliance is placed on the decision of 6 El & Bl 327 (1). In that case the plaintiff claimed against the defendants, a joint stock company on a bond signed by two directors under the seal of the company whereby the company acknowledged themselves to be bound to the plaintiff in £2,000. The plea set out the condition, which appeared to be for securing to the

1. Royal British Bank v. Turquand, (1856) 6 El & Bl 327=24 L J Q B 327=1 Jur N S. 1086.

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plaintiff, who was a banker, such sum as the company should, to the amount of £1,000 owe to the plaintiff on the balance of the account current, from time to time, and for indemnifying plaintiff to that amount from losses incurred by reason of the account between plaintiff and defendants. The plea further set out clauses of the registered deed of settlement, by which it appeared that the directors were authorized, under certain circumstances, to give bills, notes, bonds or mortgages; and one clause provided that the directors might borrow on bonds such sums as should, from time to time, by a general resolution of the company, be authorized to be borrowed. The plea averred that there had been no such resolution authorising the making of the bond, and that it was given without the authority of the shareholders. The replication set out the deed of settlement further, by which it appeared that the company was formed for the purpose of carrying on mining operations and forming a railway. On demurrers to the plea and replication the plaintiff was held entitled to judgment, the obligee having, on facts alleged, a right to presume that there had been a resolution at a general meeting, authorizing the borrowing the money on bond. The facts set out in the judgment show that at a general meeting of the company it was resolved that the directors of the company should be and they were thereby authorized to borrow on bond such sums for such periods and at such rates of interest as they might deem expedient, in accordance with the deed of settlement and the Act of Parliament; and the said resolution had remained unrescinded. In the judgment Jervis, C. J., observed as follows (p. 331):

My impression is . . . that the resolution set forth in the replication goes far enough to satisfy the requisites of the deed of settlement. The deed allows the directors to borrow on bond such sum or sums of money as shall from time to time, by a resolution passed at a general meeting of the Company, be authorized to be borrowed: and the replication shows a resolution, passed at a general meeting, authorizing the directors to borrow on bond such sums for such periods and at such rates of interest as they might deem expedient, in accordance with the deed of settlement and the Act of Parliament; but the resolution does not otherwise define the amount to be borrowed. That seems to me enough. If that be so, the other question does not arise. But whether it be so or not we need not decide; for it seems to us that the plea, whether we consider it as a confession and avoidance or a special non est factum, does not raise any objection to this advance as against the Company. We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the Statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done.

The facts thus show that the directors could borrow on bonds such sums, as from time to time by a general resolution of the company they be authorized, and a resolution having been passed, the lender was not called upon to make any other inquiry, but would be entitled to rely on what appeared to be done on the face of the document as legitimately done. The judgment, however, makes clear the distinction between a case where the directors are permitted to borrow on certain conditions as contrasted with the case of a prohibition from borrowing contained in the article. In other words if the article authorizing the directors to borrow is so worded as to give them authority or permission to borrow on certain conditions, and ostensibly those conditions were fulfilled, the lender would be entitled to act on the footing that the necessary steps were taken, and the way in which the authority is given is a matter of the internal management of the company. On the other hand, as the judgment points out, when there is an express prohibition to borrow beyond a certain limit contained in the article itself, the lender cannot rely on the principle of this case but has to satisfy himself that in accordance with the terms of the article the prohibition does not stand in the way of the directors borrowing the money.

This distinction is made clear and accepted by the decision in 4 I A 86 (2). In that case by Art. 50 of the articles of association it was provided that the directors' power of borrowing sums on the credit of the company "should not exceed in the aggregate, as an existing debt, at the same time, one-half of the then actually paid up capital." The articles contained no restriction upon the com-

2. Irvine v. Union Bank of Australia, (1877) 3 Cal 280=4 I A 86=3 Sar 692 (PC).

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pany's power of borrowing; and the directors' power to borrow was capable of being extended under Art. 31, by one-half of the votes of all the share-holders given at a general meeting. In construing the terms of this article their Lordships of the Privy Council held that it was very clearly beyond the authority of the directors to borrow, upon the credit of the company, any sum exceeding one-half of the actually paid up capital of the company. There is no doubt that the authority of the directors, limited as it was by the articles, was capable of being extended under the provisions of Art. 31. But by that article one-half of the votes of the share-holders given at a general meeting called for the purpose was necessary. It was not contended that the authority of the directors to borrow was ever extended at a general meeting of the share-holders held for the purpose and therefore the lender was not entitled to presume that the directors had any authority to borrow beyond the prescribed limits. In the course of the judgment their Lordships considered the applicability of 6 El and Bl 327 (1) and observed as follows (p. 99 of 4 I A):

> The case of 6 El & Bl 327 (1) was decided with reference to a company registered under 7 and 8 Vict., C. 110, and Jervis, C. J., remarked that the lender, finding that the authority might have been made complete by a resolution would have had a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done. In the present case however the bank would have found that, by the articles of association the directors were expressly restricted from borrowing beyond a certain amount, and they must have known that if the general powers vested in the directors by Art. 50 had been extended or enlarged by a resolution of a general meeting of the share-holders under the provisions of S. 31, a copy of that resolution ought, in regular course, to have been forwarded to the Registrar of Joint Stock Companies, in pursuance of S. 53 of the Companies Act, and would have been found amongst his records. Their Lordships are of opinion that the learned Recorder was correct in holding that this case is different from that of 6 El and Bl 327 (1).

Article 73 of the articles of association contained in Table A is similar in terms to the article in 4 I A 86 (2) and supports the contention that when there is a prohibition against borrowing contained in the article, it is not a case of internal management as decided in 6 El and Bl 327 (1). Under the circumstances, and it being common ground that no resolution at any general meeting of the company was passed, the directors were not authorised to borrow money beyond the amount of the issued share capital of the company. As the original dealings giving rise to the debt were between M. T. Ltd. and the company, it would be convenient to consider the claim of M. T. Ltd. first. Their claim is a money claim. Relying on 4 I A 86 (2) the liquidator contends that if the borrowing is ultra vires the directors, no debt binding on the company is created except when the company ratifies it. It is urged that there is no valid ratification of the borrowing because the attention of the shareholders was never expressly drawn to the fact that the directors having no authority to borrow in excess, had so borrowed and at the meeting they were called upon to confirm that unauthorised borrowing of the directors. In this connexion also the liquidator relies on the observations in 4 I A 86 (2) to the effect that 6 El and Bl 327 (1) does not apply. The liquidator further relies on the decision in 1914 A C 398 (3) in which it was held that if a company is not authorised to borrow any money and if money in fact is borrowed, no claim can be maintained by the lender against the company on the footing either of debt or of money had and received. In that case, Viscount Haldane L. C., while considering an unauthorised borrowing by a company which was a statutory society and had no power to borrow, observed as follows (p. 414) :

> If it be outside the power of a statutory society to enter into the relation of debtor and creditor in a particular transaction, the only possible remedy for the person who has paid the money would, on principle, appear to be one in rem and not in personam, a claim to follow and recover specifically any money which could be earmarked as never having ceased to be his property. To hold that a remedy will lie in personam against a statutory society, which by hypothesis cannot in the case in question have become a debtor or entered into a contract for repayment, is to strike at the root of the doctrine of ultra vires as established in the jurisprudence of this country. That doctrine belongs to substantive law and is the outcome of statute, and cannot be made different by any choice of form in procedure.

The Lord Chancellor, after examining in detail how actions for money had and received came into existence, held that none of the underlying principles could be invoked as an authority for the proposition that an action for money had

3. Sinclair v. Brougham, (1914) A C 398=83 L J Ch 465=58 S J 302=30 T L R 315=111 L T 1.

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and received would have lain in a case of borrowing ultra vires the company. The other Law Lords expressed concurrent opinions on this point. On behalf of M. T. Ltd., on the other hand, it is contended that the whole argument of the liquidator was fallacious and was based on a misconception of the situation. The principles laid down and the opinions pronounced in 1914 A C 398 (3) are all based on the central fact that the borrowing by the society itself was ultra vires. In my opinion the contention of the liquidator in this connexion is wrong. According to the general principles of law, when an agent borrows money for a principal, without the authority of the principal, but if the principal takes the benefit of the money so borrowed or when the money so borrowed has gone into the coffers of the principal, the law implies a promise to repay. The lender has not advanced the money as a gift but has given them as a loan, and the principal having received the benefit of the money, the law implies a promise to repay. This view is supported by the decisions in (1894) 2 Q B 40 (4) and (1906) 1 K B 103 (5). There appears to be nothing in law which makes this principle inapplicable to the case of a joint stock company when the borrowing power of the company itself is unlimited. The position, in my opinion, would be that the principal (the company) through its agents (the directors or the managing agents) had borrowed money which the principal had not authorised the agents to borrow. However, the money having been borrowed and used for the benefit of the principal, either in paying its debts or for its legitimate business, I do not think the company can repudiate its liability to repay on the ground that the agents had no authority from the company to borrow. In my opinion, when these facts are established, a claim on the footing of money had and received would be maintainable. The decision in (1914) A C 398 (3) is clearly based on the fundamental fact that the society was prohibited by statute from borrowing any money and therefore any borrowing by the company i. e., the principal itself would be ultra vires. The observations of Lord Haldane, L. C., apply, in my opinion, to that set of facts alone.

I am further supported in this view by the decision in 29 Beav 353 (6), where it was held that when the directors of a company have no power to borrow, a person lending money to the company cannot enforce payment of it against the company unless it had been bona fide applied to the purposes of the company. In that case the directors having no borrowing powers, being pressed for money by their contractor, obtained for him, on credit, £2,000 at a banker's upon their guarantee. The contractor afterwards agreed to abandon the plant, etc., to the company, on receiving £600 and being indemnified against the banker's claim. Subsequently to this, the secretary of the company, with the sanction of the directors, borrowed £500 in his own name for the company, which was applied in paying the bankers and a judgment debt of the company. The company had the benefit of the plant, etc. It was held that the secretary could recover the amount from the company with interest. The principle of that case was accepted and followed in 30 Beav 225 (7). There a sum of money had been borrowed from the lender by *H*, the secretary of a company, and for which three of its directors had become sureties. The directors had no borrowing powers, but it was admitted that the money had been applied for the benefit of the company. Judgment had been signed against *H* for the debt, and he applied to prove the amount against the company which was being wound up. It was held that money borrowed for the company and bona fide applied for its benefit could be recovered from the company although the directors had no borrowing powers.

In 7 Ex 119 (8) the plaintiffs, a telegraph company, invited applications for shares, received some in the ordinary way and allotted some on which deposits were paid. The number allotted was, however, insufficient to procure a settling day on the Stock Exchange, and some of the directors of the company, *S*, the promoter, and *C*, the defendants' manager, agreed, in order that the defendants

4. Reid v. Rigby & Co., (1894) 2 Q B 40=63 L J Q B 451.
5. Bannatyne v. MacIver, (1906) 1 K B 103=75 L J K B 120=54 W R 293=94 L T 150.
6. Troup's Case, (1860) 29 Beav 353.
7. Hoare's Case, (1861) 30 Beav 225.
8. British and American Telegraph Co. v. Albion Bank, (1872) 7 Ex 119=41 L J Ex 67=20 W R 413=26 L T 257.

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might certify to the committee of the Stock Exchange the requisite amount of shares to have been subscribed, that an account should be opened in *S's* name with the defendants, and another account in the plaintiffs' name ; that the plaintiffs should guarantee to the defendants the repayment of any money drawn by *S*, and charge with such repayment any balance in their favour ; that the defendants should have a bonus of £600, and *C*, £1,000 ; that *S* should get persons to apply for shares, which would be duly allotted, and should draw on his account for, and pay into the plaintiffs' account the requisite deposits, taking blank transfers for the pretended allottees. This plan was carried out. Accounts were opened, that in the plaintiff's name with £1,500 really paid in ; that in *S's* name with a loan of £1,500 from the defendants. Sham applications were obtained by *S* and shares allotted to them. *S* thereupon drew on his account, and with the proceeds paid the requisite deposits into the plaintiffs' account. The pretended allottees, immediately after the shares were allotted, handed blank transfers to *S*. Finally the plaintiffs' account with the defendant stood with a credit of £24,505 and odd, made up of £1,500 really paid in and the pretended deposits. *S's* account stood with a debit of £24,506 and odd made up of the sums he had drawn and the £1,500 loan. No settling day was ever granted; and the plaintiffs' company afterwards went into liquidation under a winding up order. A suit was filed to recover the whole amount to the credit of the plaintiffs. The defendants paid the bonus of £600 into Court, and denied liability as to the residue. It is apparent on the facts that the directors and parties were not authorised to do the acts for the company and the same were not therefore binding on the company. It was however held that the plaintiffs were entitled to the repayment of £1,500 actually paid by them to the defendants but to no more. This case, in my opinion, is a clear authority for the proposition that money actually received by the company and used for its business can be recovered by the claimants. In Halsbury's Laws of England (Edn. 2), Vol. 5, at p. 314, this case is relied upon for the following proposition :

> Apart from ratification, the company will be answerable for any property which has come into its possession through the unauthorised acts of the directors.

It is argued on behalf of the liquidator that 4 I A 86 (2) decides to the contrary. On a closer examination of the judgment in that case, however, I am unable to agree with this contention. There, on 23rd December 1867, the directors of the O. R. Company obtained from the bank a letter of credit, No. 150, for £10,000, and on 11th September 1868 a letter No. 141, for £5,000, and stated those facts in their report of 29th October 1868, which was ratified at the half yearly meeting of that date. Letter No. 150 expired on 29th March 1869, but was renewed. On 9th September 1869, the directors obtained another letter of credit, No. 153, for £5,000, but this act was never assented to or ratified by the shareholders. In a suit by the respondent bank to enforce against the appellant, as the assignee of the right, title and interest of the O. R. Company, an equitable mortgage which had been granted by the company to secure advances made by the bank, which, with interest, amounted to £15,296 it appeared that half of the actually paid up capital was never more than £8,550 ; that at the end of 1870, the balance due to the bank was £8 ; and that the sums claimed in this suit had been advanced in February 1871, viz., £10,000 under the letter No. 150, and £5,000 under letter No. 153. The trial Court passed a decree declaring a charge for £14,984-16-8, in favour of the bank and directed a sale in default. The property, which originally belonged to O. R. Company, was purchased by the appellant on 31st May 1872, at a sale by auction in execution of three decrees obtained by the Bank of Bengal and two others against O. R. Company. At the date of the auction sale the title-deeds of the property were held by the respondent bank as equitable mortgagees by deposit. The question raised in the appeal was : "What is the sum for which the respondent bank is entitled to a charge upon the property?" The bank contended that it was entitled to a charge for the whole amount owing to it by the O. R. Company. It was contended by the appellant that the charge was limited to half the amount of the actually paid up capital of the company, because Art. 50 of the articles of association prohibited the directors from borrowing more than

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half the amount of the paid-up capital of the company. The whole judgment shows that the question of the liability of O. R. Company, for the balance of the debt, which was disallowed as a charge against the property, was not the point in issue before the Privy Council. Towards the end of the judgment it is specifically pointed out that

for the above reasons their Lordships are of the opinion that the plaintiffs are not entitled, as against the defendant, to a charge on the property beyond the amount of one-half of £17,100, the paid-up capital of the company.

The form of the order finally made also makes this clear. It was as follows (p. 100):

Their Lordships will therefore further advise Her Majesty that it be ordered that the costs of the suit in the lower Court, both of the plaintiffs and of the defendant respectively, as taxed by the lower Court, be paid to the said parties respectively out of the proceeds of the sale of the property which are now in Court, and that out of the balance of such proceeds there be paid to the plaintiffs a sum of rupees equivalent, at the rate of exchange current between Rangoon and England at the time of filing of the suit, to the principal sum of £8,550, with interest thereon, at the rate of 8 per cent. from 5th October 1872 to the date of the sale of the property, together with a proportionate part of the accumulations, if any, of the proceeds of the sale, and that the residue of the proceeds and of the accumulations thereon, if any, be paid to the defendant-appellant.

The O. R. Company, who were parties to the original suit had not appeared before the Privy Council at all. The question of directing an inquiry as to what portion was bona fide used for the benefit of the company is not considered, nor is the question of a tracing order discussed. I am therefore unable to consider this decision as overriding the general principle of law under which a principal is liable for what he actually receives, when his own powers of borrowing or receiving are not limited. In the present case the balance-sheets and the accounts put in show that the amount borrowed by the company from M. T. Ltd. was utilised for the business of the company and the results of the dealings were submitted every year to the share-holders. It is not suggested on behalf of the liquidator that any business done by the company was ultra vires the company. Therefore the money received by the company from M. T. Ltd., through the directors and managing agents, was bona fide utilised for the business of the company and the company has received the benefit thereof. I therefore hold that for the reasons mentioned above M. T. Ltd. are entitled to claim from the company the balance of the amount advanced by them. It is further urged on behalf of M. T. Ltd., that in any event the company is liable because however unauthorised the directors' borrowings be, the share-holders of the company were aware of this and have ratified the same by their acquiescence. In this connexion M. T. Ltd. rely on the balance-sheets prepared by the directors and passed by the share-holders, year after the year, at their annual general meetings from 1921 onwards. As I have pointed out, these balance-sheets clearly show the amount due by the company to M. T. Ltd. from year to year and it is not disputed that those balance-sheets were duly passed by the share-holders.

In 29 L J (N S) Ch 667 (9), by the deed of settlement of a joint stock company power was given to a meeting, consisting of two-thirds in number and value of the share-holders, to authorize the directors to borrow money upon debentures; and at a meeting of share-holders holding less than two-thirds of the shares it was resolved that the directors should be authorized to borrow money on debentures. The directors accordingly borrowed on debentures diverse sums of money which were applied in discharging the debts and liabilities of the company. The debenture debts regularly appeared in the reports of the directors which were confirmed at the annual general meeting of the share-holders, and interest was regularly paid, with the consent of share-holders, until the winding up of the company, a period of two years. It was held that though the debentures were clearly improperly issued, yet, as the money had been raised and applied for the benefit of the company, and the share-holders had acquiesced for two years, it was too late to dispute their validity. The report shows that the holders of the debentures themselves were present at the meeting of the share-holders, which passed the resolution, and were therefore conscious of the irregularity of the meeting. It is urged that this case distinctly supports the contention of M. T. Ltd., because the balance-sheets showed the amount from

9. In Re The Magdalena Steam Navigation Co., (1860) 29 L J (N S) Ch 667=6 Jur N S 975=8 W R 329.

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time to time due by the company to M. T. Ltd., and also showed the amounts from time to time paid by way of interest to M. T. Ltd. in respect of these borrowings. It is pointed out that at no time before the liquidation any share-holder had contended that the borrowings were not binding on the company. On behalf of the liquidator reliance is placed on the decision in (1927) 1 K B 246 (10), where it was held that although a person who contracts with an individual director or servant of a company, knowing that the board of directors had powers to delegate its authority to such an individual, may under certain circumstances assume that that power of delegation had been exercised and that he may safely deal with the individual in question as representing the company, he cannot rely on the supposed exercise of such power if he did not know of the existence of the power at the time he made the contract. It was also held that the doctrine of constructive notice operates adversely to a person who neglects to inquire; it does not entitle such a person to claim for his own advantage to be treated as having knowledge of the facts which an inquiry would have disclosed. In my opinion the contention of M. T. Ltd. in this connexion is unsound. In order to establish a case of ratification it appears to be essential that the party ratifying should be conscious that an act beyond the authority of the agent had been done, and further after notice of that fact the party consciously by an overt act agreed to be bound by it or by acquiescence in the situation arising thereafter allowed the business to continue. In either event it appears that consciousness of the act done by the agent without authority must be proved, and, secondly, it should be proved that, after notice of such unauthorized act, the principal adopted the transaction.

The question of adopting the transaction by the share-holders passing the balance-sheets has been considered in some English cases. In 3 H L 263 (11), the question indirectly came to be considered and Lord Cairns, L. C., in considering this point held that the share-holders who had agreed to the scheme had no knowledge that the scheme which they were adopting was the scheme originally put forward. In other words that case shows that in order to establish a case of ratification it was essential to prove in the first instance that the alleged assent was given on proof of consciousness of the act having been done without authority or after full knowledge of the transaction which was being assented to. Even in the dissenting judgment of Lord Cranworth, who held that when the directors had exceeded their legal powers and the share-holders took no steps in the matter but allowed the things done to remain unimpeached for years they must be taken to have retrospectively sanctioned what had been done, the fact that the share-holders were aware that the directors had been exceeding their legal powers was emphasized. In 42 L T 206 (12) the question again came to be considered. In that case a certain item of expenditure was included in a larger item in the balance-sheet and that balance-sheet was passed by the share-holders at their meeting. The item included was shown to be an unauthorized expenditure. Brett, L. J., in considering the question of ratification observed as follows (p. 208) :

> But it cannot be said that the company ratified the payment by passing it unquestioned on the balance-sheet, unless it appeared there in such a way as to attract the attention of persons of ordinary care. There must have been direct notice, or sufficient to put a person of ordinary care upon inquiry as to the item. The mere statements on the balance-sheet in this case would not have put such a person upon inquiry so as to lead him to the facts. Therefore I think there is no evidence of ratification.

In (1914) 1 Ch 139 (13), the question of waiver in respect of an ultra vires payment, by receiving and adopting the balance-sheet, came to be considered and at p. 176 it was observed as follows :

> After they learned at the share-holders' meeting of 14th December 1908, that the legality of these payments was questioned, the meeting was adjourned for the purpose inter alia of inquiries being made into the matter, and the balance-sheet and accounts were subsequently approved by the share-holders at the adjourned meeting. . . .

These observations also show that in order to establish a case of ratification it

10. Houghton & Co. v. Nothard, Lowe and Wills, (1927) 1 K B 246=96 L J K B 25=136 L T 140 affirmed in(1928) A C 1=97 L J K B 76=44 T L R 76=138 L T 210.
11. Houldsworth v. Evans, (1868) 3 H L 263=37 L J Ch 800=19 L T 211.
12. In Re Ry. and Gen. Light Improvement Co., Marzettis Case, (1879) 42 L T 206=28 W R 541.
13. In re Republic of Bolivia Exploration Syndicate, Ltd., (1914) 1 Ch 139=83 L J Ch 226=109 L T 741.

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is essential to prove knowledge of the fact that the act was unauthorized in the first instance and that after clear notice either by acquiescence or an overt act the share-holders of the company adopted the transaction. 4 I A 86 (2) makes the point still more clear. At p. 95 their Lordships observed as follows :

> Their Lordships think that it would be competent for a majority of the share-holders present (though not a majority of the share-holders of the company), at an extra-ordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority; and they are not prepared to say that if a report had been circulated before a half-yearly meeting distinctly giving notice that the directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the share-holders present at the half-yearly meeting.

The case of 29 L J (N S) Ch 667 (9) decided nothing to the contrary. In that case also the share-holders who passed the resolution with insufficient majority are shown to be conscious of the deed of settlement which provided the requisite majority of two-thirds in numbers and value of the share-holders present at the meeting. It is not a case of the directors exceeding their authority, but a case where a company by an irregular resolution authorized the directors to do a thing. Having regard to these considerations in my opinion the contention of M. T. Ltd., that the company by adopting the balance-sheets had ratified the borrowings, cannot be accepted.

It is next contended on behalf of the liquidator that the claim, now made by M. T. Ltd., wholly represents the balance of unauthorized borrowings. This contention is based on the argument that in considering the account of borrowings and repayments the rule in (1816) 1 Mer 572 (14) does not apply. In this connexion reliance is placed on the decisions in (1882) 22 Ch D 61 (15), (1884) 9 A C 857 (16), (1885) 29 Ch D 902 (17) and (1914) A C 398 (3). Having regard to the view I have taken, it is not necessary to decide this. As however an elaborate argument was addressed to me, I think I should shortly express my opinion on the point. I do not think the liquidator's contention in this connexion is correct. The first three authorities relied upon by the liquidator do not help him. In those cases an attempt was made by the claimant to show that the money advanced had been applied towards the payment of debts and liabilities of the Society properly payable by it and it was held that in making the inquiry as to what amount had been properly applied in paying the debts of the company the claimant could not rely on the rule in (1816) 1 Mer 572 (14). In my opinion when out of the total sum advanced by the party if a portion is authorised and the rest unauthorised according to the principles discussed in (1914) A C 398 (3), the excess, if it is ultra vires the company, would never cease to be the property of the lender, and, if traced, must be returned by the borrower. The rule of law would, therefore, be that when the directors have borrowed without any authority and then repaid money, they should be deemed to have done the right thing, viz., return what never belonged to the company. Viscount Haldane L. C. has put the proposition very succinctly in the following words (p. 426) :

> The society ought in my opinion, to have been regarded, in the absence of evidence to this effect, as having simply returned to the bankers the latter's own money.

According to the Lord Chancellor therefore in the absence of evidence to the contrary, when repayments are made by the company, they should be treated simply as returning to the lender his own money, and which in law, having regard to the incapacity of the company to borrow, had never become the property of the company. These observations therefore, instead of supporting the contention of the liquidator, support the contention of M. T. Ltd. Applying that principle to the account it should be held that the first five lacs of rupees, borrowed by the company from M. T. Ltd., were the authorised borrowing and the excess was unauthorized so far as the directors are concerned. Thereafter when in the subsequent years or the same year there are repayments, the same should be treated as repayments of the unauthorised borrowings, i. e., re-

14. Clayton's case, (1816) 1 Mer 572.
15. Blackburn and District Benefit Building Society v. Cunliffe, Brooks & Co., (1882) 22 Ch D 61=31 W R 98.
16. Cunliffe, Brooks & Co. v. Blackburn and District Benefit Building Society, (1884) 9 A C 857=54 L J Ch 376.
17. Blackburn and District Benefit Building Society v. Cunliffe, Brooks & Co., (1885) 29 Ch D 902=54 L J Ch 1091=53 L T 741.

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turn to M. T. Ltd., of their own money. Looking at the account in that way and having regard to the fact that the balance now claimed is only Rs. 4,91,284-0-8, it is evident that, according to the principles laid down by Viscount Haldane L. C., the whole of the balance now claimed by M. T. Ltd. represents the authorised borrowing, the unauthorised borrowing having been repaid during the interval by the directors. This contention of the liquidator therefore, if necessary to be considered, must also fail.

The observations and principles contained in (1914) A C 398 (3), with regard to making a tracing order, were fully argued. Having regard to my finding the question does not arise, and therefore I do not propose to examine the cases cited on the point. It was lastly contended on behalf of the liquidator that no further call on the share-holders should be made. That contention is based on (1914) A C 398 (3). I do not think that case stands in the way of M. T. Ltd. The principles there discussed were for finding how the assets which were the outcome of a wholly ultra vires business were to be divided between the creditors of the ultra vires business and the shareholders of the same ultra vires business. In the present case, M. T. Ltd. claim a sum of money payable from the company in liquidation, and if the claim is allowed, all the liabilities of the share-holders to satisfy the claim of a person who is entitled to the payment of a specified sum of money must follow. I shall consider next the claim of Sassoons. It is contended on behalf of the liquidator that the agreement of 28th February 1928 is not valid and binding on the company because it is a suretyship transaction. It is pointed out that in the deed itself the company is called surety. It is common ground that at the time of the execution of the deed no money was paid and the company had borrowed no money from Sassoons.

It is further pointed out that in spite of the deed, and all the recitals contained therein, M. T. Ltd. continued to be the creditors of the company, and Sassoons to be the creditors of M. T. Ltd., for the whole amount, as before. In the books of Sassoons the company is not shown to be their debtor nor in the books of the company are Sassoons shown to be their creditor. The result is that the legal relations subsisting between the parties till then were not altered and the company and Sassoons do not assume the relationship of debtor and creditor. The right of Sassoons is only under the deed of mortgage and there are no other relations on which the claim put forward by Sassoons could be sustained. As regards the clause by which the company and M. T. Ltd. jointly and severally promised to pay the Sassoons Rs. 4,50,000, it is contended that this provision cannot override the legal relations established by the description given to the company in the deed itself. In any event it is pointed out that, as the liability of the surety is co-extensive, the two clauses can be reconciled and the deed is only a deed of suretyship. It is further contended that if the two clauses cannot be reconciled, the first must prevail on the general principle that in construing a deed the first clause prevails. The liquidator contends that such a transaction of suretyship is ultra vires the directors and also the company.

In this connection reliance is placed on the decision in 35 Beav 353 (18). In that case a company, which was a mining company, after its incorporation entered into a written contract with G, an engineer, for the construction of certain work and erection of plants, machinery, etc., and agreed to pay £8,500 to him. The payments under the contract to G were to be made every month on a certificate of the engineer of the company less twenty per cent. Considerable sums of money were advanced by bankers to G to go on with the erection, and in January 1865, he owed to the bankers upwards of £14,000 for moneys advanced to him. The company also owed the bankers £1,272 and was liable for £5,000 on bills discounted by the bankers and which formed part of the £14,000 due from the contractor. In this state of things an indenture of mortgage was executed by G of the first part, the company of the second part and the bankers of the third part, which recited the contract with G and that he had since erected diverse building and machinery in pursuance of the contract. It further recited that G had received £19,578 from the company in part-payment and that a large sum still remained due to him from

18. Crenver, etc. Mining Co., (Ltd.) v. Willyams, (1866) 35 Beav 353=14 W R 444=14 L T 93

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the company under the contract; that G was possessed of machinery and that he was indebted to the bankers for money advanced for the purposes of the contract; that the company was indebted to the bankers in £1,272, and that G had applied to the bankers to make him further advances to enable him to carry out the work which the bankers had agreed to do on having the repayment of the sum of £14,289, the balance which was due by G to the bankers, and £1,272 which was due by the company to the bankers, and any other sum advanced by them to G secured as mentioned in the deed.

By the indenture G and the company covenanted to pay to the bankers £14,239 and £1,272 with all further sums advanced to G with interest and G assigned to the bankers all moneys due or to become due under the contract and all engines, etc., and the company assigned to the bankers all tin, copper, etc., to be raised out of the mines. In a suit by the bankers to enforce the mortgage, the trial Court refused to recognise the validity of the mortgage and dismissed the suit with costs. The matter went in appeal and the decision is reported in 14 W R (Eng.) 1003 (19). The Court upheld the contention of the company in part and gave a declaration that the mortgage was invalid so far as it made the property of the company a security for the debts due by G to the bankers. So far it secured the moneys due by the company, and so far as it was a mortgage by the contractor of his property to the bankers, it was not interfered with. It is contended by the liquidator that the position in the present case is the same. It is further urged by the liquidator that the question of acquiescence and ratification does not come in because in the balance-sheets of the company it is nowhere mentioned that Sassoons were given the security. On the other hand the balance-sheets of the company after 1927 show that M. T. Ltd. were secured creditors. On this ground it is contended that as the transaction is ultra vires the company and the directors, the deed is a nullity and no claim could be created thereunder. In the alternative it is contended that if the transaction is put forth as a new contract made between the parties on 28th February 1928 it must fail because there was no fresh consideration.

It is therefore necessary to look to the provisions of the deed itself. After describing M. T. Ltd., as the mortgagors, the company as sureties and Sassoons as the mortgagees, the deed recites as follows:

And whereas the surety required money for the purpose of and in connection with its business and requested the mortgagor to lend and advance to it the money so required, and whereas the mortgagor requested the mortgagee to lend and advance to it a sum of Rs. 9,00,000 (nine lacs) in order to enable it to lend and advance to the surety the amount required by the surety and to use the remaining portions for its own business, and whereas the mortgagee agreed to lend and advance to the mortgagor the said sum of Rs. 9,00,000 (nine lacs) on the mortgagor agreeing to repay the said sum with interest thereon, and to secure repayment of the moiety thereof by the mortgagor depositing the title-deeds relating to . . . belonging to the mortgagor and to secure repayment of the other moiety by the surety depositing with the mortgagee by way of equitable security the title deeds relating to the said properties. . . particularly described in the first and second schedules hereunder written, and whereas the mortgagee hath already paid to the mortgagor the said sum of Rs. 9,00,000 (nine lacs) as the mortgagor doth hereby admit and acknowledge out of which the mortgagor hath paid to the surety a sum of over Rs. 4,50,000 (four lacs and fifty thousand) as the surety doth hereby admit and acknowledge . . . And whereas the surety also hath deposited with the mortgagee the title-deeds of the said lands . . . belonging to it and whereas the mortgagee hath called upon the mortgagor and the surety to execute these presents evidencing the said deposit of title deeds as such security now this indenture witnesseth that in consideration of the amount lent and advanced to it by the mortgagor out of the said sum of Rs. 9,00,000 (nine lacs) lent and advanced to the mortgagor by the mortgagee (the receipt of which the surety and the mortgagor do hereby respectively admit and acknowledge) the surety hath already deposited with the mortgagee the title-deeds mentioned in the schedule hereunder written relating to lands . . . belonging to the surety to the intent that the said lands. . . may be equitably charged with the repayment to the mortgagee of the sum of Rupees 4,50,000 out of the said sum of Rs. 9,00,000 lent and advanced to the mortgagor by the mortgagee with interest on the same from 1st July 1926 at the rate of 6 per cent . . . and the mortgagor and the surety do hereby jointly and severally agree to repay to the mortgagee on 31st October 1931, the said sum of Rs. 4,50,000 with interest thereon at the rate aforesaid and do hereby undertake that the surety shall execute at its own costs, when called upon a proper legal mortgage of the said lands . . . to secure the said sum of Rs. 4,50,000 with interest. . .

I am unable to accept the first argument urged on behalf of the liquidator

19. Crewer & Wheal Abrm. Untd. Mining Co. (Ltd.) v. Willyams, (1866) 14 W R (Eng) 1003.

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that because in the deed the company is described as a surety they must be treated as sureties. While taking into consideration that description used in the deed to arrive at a correct conclusion, it is necessary to look to the whole deed and consider the nature of the transaction between the parties. In my opinion the principle that the first statement in the deed should prevail is not relevant to be considered in this connection, because what the Court is called upon in this case is not to determine the question of grant of property, in which case that principle is held to be applicable, but to determine the true effect of the document. The liquidator does not dispute the correctness of the recitals in the deed and no evidence is led to challenge the truthfulness of the statements contained therein. There is of course no proof of the statements being wrong. Looking to the whole deed, the following facts appear to be established :—(1) that on 1st July 1926, a sum of Rs. 9,00,000 had been advanced by Sassoons to M. T. Ltd. ; (2) that out of that Rs. 4,50,000 were admitted to be advanced by M. T. Ltd., to the Company ; (3) that M. T. Ltd., had requested Sassoons to lend the said sum of Rs. 9,00,000, to them in order to enable them to lend and advance to the company the amount required by the company ; (4) that at the time the said sum of Rs. 9,00,000 was advanced, M. T. Ltd., had agreed to give by way of security its own property and the company's property ; (5) that the company had already deposited with Sassoons the title-deeds of their property ; (6) that Sassoons had called upon M. T. Ltd., and the company to execute the document evidencing the deposit of the said title-deeds as security; (7) that in consideration of the amount lent and advanced M. T. Ltd., had already deposited the title-deeds of their property by way of equitable mortgage for the repayment to Sassoons of the sum of Rs. 4,50,000 out of the said sum of Rs. 9,00,000; (8) that by the document M. T. Ltd., and the company did jointly and severally agree to repay to Sassoons on 31st October 1931 the said sum of Rs. 4,50,000 with interest ; and (9) that the company agreed to execute at its own costs, when called upon, a proper legal mortgage in favour of Sassoons of the said lands and building to secure the said sum of Rs. 4,50,000, acknowledged to be received by the company out of the said Rs. 9,00,000.

In order to decide whether the transaction is ultra vires the company or not, it is necessary to have regard to these facts read along with Cl. 3 (*f*), of the memorandum of association of the company. Under that clause the company could give a promissory note to M. T. Ltd., for the amount borrowed by the company from M. T. Ltd. It is similarly permissible for M. T. Ltd., to ask the company to join them in passing a promissory note to borrow money, and for the company to join accordingly. Therefore a promissory note signed by M. T. Ltd., and the company, making them jointly and severally liable thereunder, is not void under Cl. 3 (f) of the memorandum of association. As the company is empowered to secure the repayment in such manner as it may deem expedient, it appears to be equally clear that to secure repayment of the amount covered by the promissory note the company could have given an equitable mortgage on its property. It is not disputed that the company, as such, apart from the question of directors' authority, could have secured the repayment of the money borrowed by it by the deposit of title-deeds with M. T. Ltd., or entered into an agreement for equitable mortgage in favour of M. T. Ltd. It is further not disputed that if such mortgage was given, M. T. Ltd., could either assign the equitable mortgage in favour of the Sassoons or could in their turn enter into another agreement of equitable mortgage in respect of the same property in favour of the Sassoons. If so, is the transaction as contained in the deed of 28th February 1928 ultra vires ? In my opinion, having regard to the terms of the deed of mortgage, it is not a document of suretyship. A contract of guarantee, which is the same as a contract of suretyship, is defined in S. 126, Contract Act, as "a contract to perform the promise, or discharge the liability, of a third person in case of his default." The person who gives the guarantee is called the "surety," the person in respect of whose default the guarantee is given is called the "principal debtor," and the person to whom the guarantee is given is called the "creditor." S. 128 provides that the liability of the surety is co-extensive with that of the principal debtor. In the present case

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the terms of the deed of mortgage do not provide that in default of the payment of money by M. T. Ltd. to Sassoons the company would make good the amount. It is also not a case of admitting or becoming liable when no money is received, but a case where the liability is admitted and security given for that portion which has admittedly gone in the possession and coffers of the company. It is a case where both M. T. Ltd. and the company jointly promise to pay the Sassoons the sum of Rs. 4,50,000 because at the initial stage M. T. Ltd. borrowed Rs. 9,00,000 from Sassoons and the company admitted that out of that sum a sum of Rs. 4,50,000 was actually received by them and which they were liable to make good to M. T. Ltd. when called upon.

The difference between the position of a surety and a joint debtor is made clear and recognised so far back as 1866 in 1 C P 297 (20). In that case the plaintiff lent money to A upon B's promise to become surety for its repayment, and after the money was advanced A and B signed and delivered to the plaintiff the following memorandum : "We jointly and severally owe you £60." It was held that this was evidence for the jury of "an account stated by A and B jointly." In (1894) 2 Q B 885 (21), the defendant orally promised the plaintiff that if he (the plaintiff) would accept certain bills for a firm in which the defendant's son was a partner, he (the defendant) would provide the plaintiff with funds to meet the bills. It was held that this was not a contract of guarantee but a case where the defendant promised to be liable on the ground of indemnity. In other words the liability of the defendant did not arise in the event of the firm failing to pay the bills, but, apart from that consideration, the defendant had promised to discharge the bills if the plaintiff for the time being accommodated the party. In the same way, in the present case, as in the event of Sassoons demanding from M. T. Ltd. payment of Rs. 4,50,000 the company could have been called upon to pay the amount forthwith by M. T. Ltd., the company agreed to indemnify Sassoons for the amount and gave the security mentioned in the deed of mortgage. In my opinion, therefore, the transaction contained in the deed of mortgage is not a suretyship transaction as argued on behalf of the liquidator. If the joint liability is admitted, no question of reduction of debt of M. T. Ltd. arises. Similarly no question of making entries in the books of any of the three companies arises. The legal effect of the deed of mortgage cannot be controlled in any event by the presence or absence of entries the parties may make or omit to make in their books.

The case of 35 Beav 353 (18) is quite distinct. In that case the company had purported to mortgage its own property for the debt due by the contractor to the banker. It was not shown that any portion of the money borrowed by the contractor from the banker was admitted to be paid by the contractor to the company. Merely because in respect of the work done and materials supplied by the contractor to the company, the contractor had an independent claim against the company, the company cannot mortgage to the banker its property for the payment of the whole debt of the contractor and also further moneys to be borrowed by the contractor for his contract. Therefore that decision does not help the liquidator.

In my opinion it is not open to the liquidator to contend that Sassoons' money had not gone to pay the creditors of the company because Sassoons paid the money to M. T. Ltd. and that money was advanced by M. T. Ltd. to the company, as admitted in the deed of mortgage, and bona fide utilised for the business of the company, as shown by its books and balance sheets. Under the circumstances, even in the absence of any extension of the directors' powers and in the absence of acquiescence or ratification, having regard to the terms of Art. 73 of the articles of association in Table A read with Cl. 3 (*f*) of the memorandum of association, the directors had power to give security in respect of a sum not exceeding Rs. 5,00,000. As under the deed of mortgage Rs. 4,50,000 are shown on the face of the document to be borrowed by the company and for which Sassoons received a security, the transaction appears to be within the competence of the directors and is binding on the company. The borrowing in excess by the directors from M. T. Ltd. does not touch the validity of the deed of mortgage or the rights of

20. Buck v. Hurst and Bailey, (1866) 1 C P 297=12 Jour N S 704.
21. Guild & Co. v. Conrad, (1894) 2 Q B 885=63 L J Q B 721=42 W R 642=71 L T 140.

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Sassoons thereunder, because if the security is treated as given for Rs. 4,50,000, out of Rs. 9,00,000, it does not follow that the security is given for the unauthorised portion of the borrowing. This is on the ground that when a man has the power to do the right thing and does a thing which is capable of being taken either as the right thing or in excess of his power to do the right thing, it should be presumed that he had done the right thing, especially when the rights of third parties would be adversely affected on the other construction. In my opinion equity demands that it should be held that the security so given was given in respect of the borrowing which the directors were empowered to borrow under Art. 73. In respect of the excess, the claim of the claimants must stand or fall on its own merits.

The balance-sheets of the company do not show the name of Sassoons as secured or unsecured creditors. Nor is it shown that at any stage the attention of all the share-holders, viz., M. T. Ltd., the ten directors and Mr. F. E. Dinshaw was drawn to the fact that the directors were doing something which under the articles they were not authorised to do. Under the circumstances, as I have pointed out before, no question of ratification by acquiescence arises. On behalf of Sassoons it is contended that, if M. T. Ltd. could have obtained the deed of mortgage from the company and could in their turn have either assigned it or executed another document of mortgage in favour of Sassoons, it is only a question of form and not of substance, and the transaction, under the circumstances, should be held to be binding on the company. For this contention reliance is placed on the decision in (1895) 2 Ch 617 (22). In that case P assigned his business to the company and the company agreed to indemnify him against the debts of his old business. To satisfy these debts the company issued debentures and gave them to certain creditors of the old business of P. It was held that the debentures were issued not for the purpose of paying the debts of third parties but, having regard to the agreement to indemnify P., the debentures were binding on the company and the debenture holders were entitled to enforce their rights against the company. It is contended by the liquidator that no such case of indemnity is proved here. In my opinion, having regard to the express terms of the indemnity contained in that case, that decision is not helpful to Sassoons. On the evidence on record and the recitals in the deed of mortgage, it is difficult to find support for the contention that an agreement of indemnity, as contemplated in that case, was entered into.

The contention of the liquidator, that if this is a fresh agreement there was no fresh consideration and therefore it must fail, is untenable. The recitals in the document coupled with the admission that the sum of Rs. 4,50,000 out of the sum of Rs. 9,00,000 borrowed by M. T. Ltd. from Sassoons was utilised by the company shows the consideration which moved the company to execute this document in favour of Sassoons. It should be remembered that under the Contract Act if Sassoons give time to M. T. Ltd. to pay their debt to Sassoons, that would be sufficient consideration in law to sustain the promise by the company to pay to Sassoons Rs. 4,50,000 out of the sum of Rs. 9,00,000 under the circumstances mentioned in the deed. It is next contended that the resolution of the directors authorising the execution of the document is bad, and in this connexion reliance is placed on Art. 77 of Table A and S. 91-B, Companies Act. It is pointed out that Mr. A. J. Raymond was a party to the resolution and he was the managing director of Sassoons and had the full powers of the board of directors. It is further pointed out that Sassoons is a private limited company and all the directors of M. T. Ltd. were parties to this resolution. It is argued that the deed of mortgage is a tripartite agreement in which all the three companies and directors were interested and therefore there was no independent person to vote at the meeting of the directors held on 23rd February 1928. Under these circumstances it is contended that the whole voting is bad and the resolution is void. It is pointed out that the interest of a person as a share-holder is sufficient to disqualify him for the voting under S. 91-B, and that the transaction is of such a nature that the Court should very minutely scrutinise the voting at the meeting.

22. Seligman v. Prince & Co., (1895) 2 Ch 617=64 L J Ch 745=73 L T 124=2 Manson 586=44 W R 6.

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The contention that Sassoons is a private limited company or that Mr. Raymond as the managing director had all the powers is quite irrelevant. As held in (1897) A C 22 (23), under the law, a joint-stock company is a distinct entity; and although all the shares may be practically controlled by one person, in law a company is a distinct entity and it is not permissible or relevant to inquire whether the directors belonged to the same family or whether it is, as compendiously described, a "one man company." The law having recognised joint stock companies as distinct entities, these inquiries and suggestions are quite irrelevant to the present contention. In my opinion the transaction is not at all unusual, because it is conceded that if two different documents, one from the company to M. T. Ltd. and another from M. T. Ltd. to Sassoons had been passed, it would have been a perfectly business transaction with no unusual character. As pointed out in the correspondence, the attempt on the part of three parties was to save costs of the two documents being prepared, and merely because the effect and result of the two documents is entered in one document, I am unable to hold that the transaction became an unusual one. It is not a case of one person giving security for the debt of another, because it is admitted by the deed of mortgage that the company gave the security only in respect of the sum of Rs. 4,50,000 admitted to be received by it out of the sum which originally came from Sassoons.

It is contended on behalf of Sassoons and M. T. Ltd. that the liquidator's contention in respect of the voting at the directors' meeting is untenable because the transaction contained in the deed of mortgage is not of the kind suggested by the liquidator. It is a transaction between M. T. Ltd. and the company on the one side and Sassoons on the other side, but it is not a contract between the company and M. T. Ltd. Under the circumstances the directors of Sassoons alone would be disqualified to vote, but not the directors of M. T. Ltd. As against this, it is argued by the liquidator that without there being a contract between M. T. Ltd., and the company, how can a contract, as contained in the deed of mortgage, come into existence? In my opinion this last argument is futile. Because the contract contained in the deed of mortgage exists between the company and M. T. Ltd. on the one hand and Sassoons on the other hand, it is not necessary that the arrangement or contract between M. T. Ltd. and the company must be contained in the same document. It is further contended against the liquidator that the interest mentioned in Art. 77 and S. 91-B, Companies Act, is some personal interest which is not in common with the other share-holders. For that purpose reliance is placed on the decision in (1895) 2 Ch 617 (22) and the remarks at p. 629, where it is pointed out that the interest should be one not in common with the others. Reliance is also placed on behalf of the claimants on the terms of S. 91-B.

In my opinion there is considerable force in the contentions urged on behalf of the claimants. I do not think however that it is necessary to go into this part of the argument. It is common ground that a resolution at a meeting of the board of directors of the company was passed and the execution of the deed was sanctioned. The correspondence further shows that Sassoons were informed of the board meeting having been held. Under the circumstances the contention urged on behalf of the liquidator is a contention in respect of the internal management of the affairs of the company and must fail. In (1896) 2 Ch 743 (24), where there was a common officer of the company who was present when the resolution which was sought to be challenged as irregular was passed, this principle came to be considered. Vaughan Williams, J., in delivering judgment observed as follows (p. 747):

> They (the share-holders) had no authority in the absence of a properly passed resolution to borrow this money. But in that state of things, the money having been lent by the society and received by the company, the question which I have stated (viz., who is to bear the loss?) arises. It is not disputed that the authority of 6 El & Bl 327 (1) is such that the society had a right to assume in a case like this that all these essentials of internal management had been carried out by the borrowing company, and that it is only in case the law imputes to the society knowledge of these irregularities that the society is not to rank . . . . . . as a creditor for the amount lent.

23. Salomon v. Salomon & Co., (1897) A C 22=66 L J Ch 35=45 W R 193=75 L T 426.

24. In re Hampshire Land Co., (1896) 2 Ch 743 =65 L J Ch 860=3 Manson 269=45 W R 136=75 L T 181.

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On the facts of the case, the learned Judge held that the knowledge of the common officer could not be imputed to the society. Apart from the fact of Mr. Raymond being a director of Sassoons the point is completely covered by the remarks of Lord Hatherley in 7 H L 869 (25) at p. 893 as follows :

> On the one hand, it is settled by a series of decisions, of which 6 H L C 401 (26) is one and 6 El & Bl 327 (1) a later one, that those who deal with joint-stock companies are bound to take notice of that which I may call the external position of the company. Every joint-stock company has its memorandum and articles of association ; every joint-stock company, or nearly every one, I imagine (unless it adopts the form provided by the statute, and that comes to the same thing) has its partnership deed under which it acts. Those articles of association and that partnership deed are open to all who are minded to have any dealings whatsoever with the company, and those who so deal with them must be affected with notice of all that is contained in those two documents.
>
> After that, the company entering upon its business and dealing with persons external to it, is supposed on its part to have all those powers and authorities which, by its articles of association and by its deed, it appears to possess; and all that the directors do with reference to what I may call the indoor management of their own concern, is a thing known to them and known to them only ; subject to this observation, that no person dealing with them has a right to suppose that anything has been or can be done that is not permitted by the articles of association or by the deed.

It is, therefore, not permissible in a case like this to inquire whether there was a proper quorum for holding a meeting or whether the meeting of the directors authorising the execution of the deed of mortgage was properly convened. These are matters of the internal management of the company, and under the principles contained in 6 El & Bl 327 (1) the company is bound by the resolution, so far as outsiders are concerned. No irregularity in the internal management would therefore vitiate the transaction so far as an outside creditor is concerned. In this transaction there appears to be no such irregularity as it was the duty of Mr. Raymond to convey to Sassoons and there is nothing by which Sassoons could be held to be aware of any irregularity. In my opinion, therefore, this contention of the liquidator must fail. On these grounds, the deed of 28th February 1928, when executed, was valid, and Sassoons have a right to recover the amount mentioned therein, according to the terms of that deed. The result, therefore, will be that their claim as secured creditors under the deed of 28th February 1928 should be allowed.

Beaumont, C. J.—This is an appeal from an order of Kania, J. made in the liquidation of T. R. Pratt (Bombay) Ltd. The claims in question were made by E. D. Sassoon & Co. Ltd. and M. T. Ltd. For simplicity I will refer to the three companies as Pratts, M. T.s, and Sassoons respectively. The learned Judge held that the claim of Sassoons was proved, as also was the claim of M. T.s ; admittedly, they were not additional but alternative claims, and it is really not necessary to consider the claim of M. T.s, if the claim of Sassoons is allowed. The facts are not, I think, substantially in dispute. Pratts was incorporated in the year 1919 with a capital of rupees five lacs, divided into preference and ordinary shares. The memorandum of association contained power to borrow and give security for the money borrowed, but there was no power to give security for a debt of third parties. Originally articles of association were prepared, but by some error they were not registered, so the company was regulated by table A ; and under Art. 73 of table A the directors' power of borrowing is limited, the article providing that the amount for the time being remaining undischarged of moneys borrowed by the directors shall not exceed rupees five lacs i.e., the capital. M. T.s was incorporated in 1920. It was formed by Messrs. Mehta & Co., who were the managing agents of Pratts, and by persons interested in Sassoons ; and the principal object of the company was to finance Pratts, the view being that Pratts' capital was insufficient for the business which they were capable of doing. M. T.s acquired practically the whole of the ordinary share capital of Pratts, but the preference shares were held by outside parties. At the date of the liquidation of Pratts, which was 22nd June 1932, a sum of approximately Rs. 4,92,000 was due by Pratts to M. T.s. Sassoons were in the habit of financing M. T.s., and in the years 1926 to 1928 there was a sum of approximately rupees nine lacs due by M. T.s to Sassoons. It appears from the correspondence that in the year 1926 Sassoons commenced to press M. T.s for security for the debt. M. T.s had an immoveable property known as the

25. Mahony v. East Holyford Mining Co., (1875) 7 H L 869.
26. Ernest v. Nicholls, (1857) 6 H L C 401.

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Collins Building, which was a part of the building in which Pratts carried on business, and Pratts had two immoveable properties ; and the correspondence shows that Sassoons wanted to get a mortgage upon all those properties, both of M. T.s' and Pratts,' as security for the money due to Sassoons. Originally it was proposed that there should be two documents—one between M. T.s and Pratts, and the other between M. T.s and Sassoons, but in order to avoid expense it was arranged to have one. Accordingly, on 23rd February 1928, resolutions were passed by the boards, both of Pratts and of M. T.s, for execution by the respective companies of a security deed in favour of Sassoons, and on 28th February 1928, the security deed in question was executed.

That document, which is exhibit J, was made between M. T.s (thereinafter called the mortgagor of the first part), Pratts (thereinafter called the surety of the second part) and Sassoons (thereinafter called the mortgagee of the third part). It recites the title to the properties which were to be mortgaged, and then it recites that Pratts required money for the purpose of their business and requested M. T.s to lend them money, and that M. T.s requested Sassoons to lend them rupees nine lacs in order to enable them to lend money to Pratts. Then it recites that Sassoons had already paid to M. T.s rupees nine lacs, out of which M. T.s had paid to Pratts rupees four and a half lacs. It is argued that in fact there is no evidence on the record that that recital is true, namely that the money borrowed by M. T.s from Sassoons had to any extent gone to Pratts ; but I see no reason why we should not accept that recital as correct. There is no evidence that it is untrue, and being an admission made by Pratts under their seal and by the other parties, I think we can accept it as true. Then the document recites deposits of the title deeds of the immoveable properties both of M. T.s and Pratts with Sassoons, and then the witnessing part states that Pratts have already deposited with Sassoons the title deeds of the properties therein mentioned with intent that the properties may be equitably charged with the repayment to Sassoons of the sum of rupees four-and-a-half lacs out of the sum of rupees nine lacs advanced to M. T.s by Sassoons with interest. Then M. T.s and Pratts jointly and severally covenant with Sassoons to pay the said sum of rupees four-and-a half lacs with interest on 31st October 1931.

Now, we had a long and elaborate argument from Mr. Coltman on behalf of the liquidator of the Pratts to the effect that assuming that that document was validly executed by Pratts, it was not binding upon them. The argument is that Pratts by that document in effect became surety for M. T.s and deposited their deeds as security for M. T.s' debt, and that under the memorandum of association they had no power to do that. It is also argued that there was no consideration in the deed in favour of Pratts. It seems to me that the argument ignores the essential fact that as between these three companies Pratts were primarily liable to pay at least rupees four-and-a-half lacs, and Sassoons were entitled to receive four-and-a-half lacs. It seems to me clear that the transaction could have been carried out, as originally suggested, by two documents. Pratts could have mortgaged their properties to M. T.s for four-and-a-half lacs, part of the moneys owing, and M. T.s could have assigned either absolutely by way of sale, or by way of security, that mortgage to Sassoons, and the actual result brought about by this document could have been brought about in that way by two documents, and no question could have been raised. To hold that an arrangement which could have been carried out by two documents cannot be carried out by one document to which all the parties interested are parties, would be to sacrifice substance to form. I think that the case of (1895) 2 Ch 617 (22), is an authority for that proposition. I agree with Mr. Coltman that that case is not on all fours with the present case. It would be on all fours if Pratts had agreed to indemnify M. T.s against their debt to Sassoons, but it seems to me that that distinction is not an essential one. The essence of this case is that as between the three parties to the deed Pratts were primarily liable to pay and Sassoons were ultimately entitled to receive the money ; and that was the position also in (1895) 2 Ch 617 (22). It is quite true that in the document there is no consideration expressed in favour of Pratts. The transaction is, I think, of the nature of a novation, that is to say, a substitution of the liability of Pratts to Sassoons for the liability of Pratts to M. T.s and M. T.s to

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Sassoons ; but it is not a complete novation, because there is no release of Pratts' liability to M. T.s and the subsequent books of the companies show that Pratts were treated as debtors of M. T.s after this document had been executed, and not as debtors of Sassoons.

But it seems to me that you cannot give effect to this document without holding that there was an implied obligation on M. T.s' part not to sue for the amount of four and a half lacs for which Pratts had given security to Sassoons as long as this mortgage stood. It seems to me plain that if M. T.s had claimed the money from Pratts, this mortgage, to which M. T.s were a party, would have been a defence. I think that there was sufficient consideration in favour of Pratts in the implied covenant not to sue on the part of M. T.s coupled with the fact that time was actually given. I agree, therefore with the learned Judge in thinking that if this document was properly executed on behalf of Pratts, it was a valid contract. It is not, in my opinion. a document of suretyship at all. There is no ground suggested for that, except the mere definition of Pratts as surety, which amounts to very little. Then, the second point argued by Mr. Coltman on behalf of liquidator of Pratts as against Sassoons, though logically it comes first, is that this document was never executed in such a way as to be binding upon Pratts. The objection arises in this way: S. 91-A, Indian Companies Act, provides that a director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company shall disclose the nature of his interest : and S. 91-B provides that no director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested ; and if he does so vote, his vote shall not be counted.

Section 91-B is not taken from the English Act. The subject-matter of S. 91-A was for the first time included in the English Companies Act by the Act of 1929 ; but there is no statutory provision in England corresponding to S. 91-B though the subject-matter of that section, namely the right of directors to enter into contracts on behalf of the company in which they have some personal interest is frequently dealt with in the articles of association. Now, the position with regard to the directors of Pratts is this. There were always a certain number of directors common to Pratts and M. T.s and from 1924 until 1931, that is to say during the whole of the material period, the Boards of the two companies were common. There were in all seven directors of the two companies. One of those directors was Mr. A. J. Raymond, and another Capt. E. V. Sassoon, both of whom were directors of Sassoons. But Mr. Raymond was more than a director. He was the Managing Director of Sassoons, and, under a power in their articles Sassoons had delegated to him all the powers of the directors. The resolution to that effect is Ex. 9. Now it is alleged that in 1928, when this mortgage was arranged and executed, all the directors of Pratts were concerned or interested in the matter individually, that is to say apart from their position as directors of Pratts, because they were directors of M. T.s and also share-holders in that company. The qualification for directors of M. T.s was the holding of one hundred shares, so that all the directors of Pratts were not only directors but also shareholders in M. T.s ; and I think that the argument that they were individually concerned or interested in this mortgage is sound. The object of S. 91-B was clearly to ensure that a company shall have the benefit of the judgment of an entirely independent Board ; and I do not think that the Board of Pratts was independent of M. T.s in the matter of this contract, or that the interests of the two companies were identical.

It was vital to M.T.s that they should get for Sassoons the security which Sassoons were asking for, which involved a mortgage of Pratts' property. No doubt, Pratts were in a difficulty in resisting any claim by M.T.s, because they owed M.T.s money. But an independent Board theoretically might have taken the view that it would be better that Pratts should be wound up rather than give security for the debt, although experience shows that directors do not usually take such a pessimistic view of the prospects of their company. But there is practical force in the suggestion that an independent Board of Pratts would not have agreed to a contract in the exact terms of the contract of 28th February 1928. An independent Board might very well have said that if Pratts were to give their property as security to

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Sassoons, at any rate they must have an out-and-out release from M.T.s of a corresponding part of their debt, and that Pratts should not be left to rely on an implied covenant not to sue on the part of M.T.s. It seems to me impossible to say that there was no conflict of interest in the matter of that mortgage between M.T.s and Pratts, although to a certain extent their interests were common. In my opinion therefore by virtue of S. 91-B, none of the directors of Pratts was competent to vote for the resolution to execute this mortgage in favour of Sassoons.

Two further questions then arise: first, is it necessary to show that Sassoons had notice of the disability arising under S. 91-B? Secondly, if so, had Sassoons such notice? Now, it is very well settled law in the case of English joint stock companies that people dealing with such a company are fixed with notice of any limitations on the power of the company contained in the statute under which it is incorporated or in the memorandum or articles of association; but that if it is shown that a particular act was ostensibly authorised by the statute and the memorandum or articles of association, persons dealing with the company are not concerned to see that the company has put itself into a position to exercise its power properly. That is the rule recognized in 6 El & Bl 327 (1), and a great many other cases. It is generally expressed by saying that outside parties are not concerned with the internal management of the company. They are not, for instance, concerned to see that there was a proper quorum of directors present, or that persons who were apparently directors of the company had in fact been validly appointed. Those are matters of internal management; and I have no doubt that if the disability of a director to vote upon a contract in which he was personally interested were imposed by the articles of association, the question whether he was personally interested in, and entitled to vote upon, a particular contract would be regarded as a matter of internal management, with which persons dealing with the company would not be concerned.

It is argued however that that position does not apply in India, because the restriction against voting is a statutory disability, and non-compliance with a public statute can never be a matter of internal management. At first sight there is, I think, force in that contention; but, on consideration, I agree with the argument of Mr. Munshi that the principle of the English cases as to internal management ought to be applied to a case of disability of directors arising under S. 91-B. It is clear that the reason for the rule applies as strongly in India as in England. The reason for the rule, I take it, is that it would be disastrous in a business community if contracts made with companies could be impeached on account of matters known to the company but not to the other contracting party. Moreover, I think that the distinction between the position in England, where the disability arises under the articles, and in India, where it arises directly under the statute, is really more apparent than real, because under S. 8, Companies Act, 1929, and the corresponding sections in earlier Acts, the articles of association are made the regulations of the company, so that they bind the company by virtue of the statute, and the only real distinction between the position in England and in India (apart of course from the fact that the articles can be altered by the company whilst the statute cannot) is that in the one case the disability of directors arises indirectly from the statute, whilst in the other it arises directly from the statute. In my judgment therefore we ought to hold that if Sassoons had no notice of the facts giving rise to the disability of the directors of Pratts to vote on this contract, then the contract ought not to be impeachable by reason of S. 91-B.

The question then arises whether Sassoons had notice. It is, of course, clear that they had notice of the terms of the contract to which they were parties, and therefore they had notice that there was a conflict of interest in relation to that contract between Pratts and M.T.s; and the only real question is, whether they had notice that the Boards of the two companies were common, and that therefore all the directors of Pratts were personally concerned or interested in the contract.

Mr. Coltman has relied on S. 87, Companies Act, which requires a list of directors to be filed with the Registrar, and he says that Sassoons therefore had notice of who the directors of Pratts and M.T.s were; but it has never been held,

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as far as I know, in the English cases that people dealing with companies have notice of the contents of all documents on the file of a particular company ; and this Court in 27 Bom L R 1218 (27) has expressed an opinion against that view. I therefore do not rely on S. 87. Apart from this the first point argued in favour of the view that Sassoons had notice of the common directorship is that they had such notice through Mr. Raymond. Mr. Munshi on behalf of Sassoons has referred us to a good many cases which undoubtedly show that where you have a director common to two companies you cannot impute to both those companies all matters within the private knowledge of the director. The cases referred to are : (1871) 7 Ch A 161 (28) ; (1896) 2 Ch 743 (24) and (1901) 2 K B 314 (29). I may take the general rule as stated in (1896) 2 Ch 743 (24). There the headnote, which I think accurately represents the decision, says :

> Where one person is an officer of two companies his personal knowledge is not necessarily the knowledge of both the companies. The knowledge which he has acquired as officer of one company will not be imputed to the other company unless he has some duty imposed on him to communicate his knowledge to the company sought to be affected by the notice, and some duty imposed on him by that company to receive the notice; and if the common officer has been guilty of fraud, or even irregularity, the Court will not draw the inference that he has fulfilled these duties.

That case was followed, as to the last portion of it, where the common director had been guilty of fraud or irregularity, by the House of Lords in (1928) A C 1 (29a) and none of the learned Lords in that case expressed any dissent from the earlier portion of the decision, so that I think one may take that case as good law. I am unable to say in this case that Mr. A. J. Raymond had no duty imposed upon him to communicate to Sassoons matters within his knowledge as a director of Pratts or M.T.s. He was more than a director of Sassoons; he was, as I have said, the managing director with all the powers of the directors; and, having regard to the relations between the three companies, I think it is a fair inference that he was placed on the boards of M.T.s and Pratts largely in order that he might represent Sassoons and might protect their interests, and I have not the slightest doubt that it was his duty to communicate to Sassoons any material fact which came to his knowledge as director of either of those companies. Whether he ever did communicate to Sassoons, the fact that the boards of directors of the two companies were common, I do not know. I should think probably he did. But if he omitted to do so, it was not, I feel sure, because he considered that he owed no duty to Sassoons to make the communication, but because he did not realize the importance of the fact.

Moreover, apart from the notice which Sassoons acquired through Mr. Raymond, I think they also had notice in another way. The attestation clause to the mortgage deed of 28th February 1928, shows that the common seals of M.T.s and of Pratts respectively were fixed pursuant to resolutions of the respective boards of directors passed at meetings held on 23rd February 1928. Sassoons were concerned to see that those resolutions were in order, because they were the foundation of their title, and if they had taken the trouble to look at the resolutions, they would have seen that they were resolutions passed by the same persons as directors of Pratts and also as directors of M.T.s. So that Sassoons knew in that way that all the directors of Pratts who voted in favour of the execution of the document of 28th February 1928, were also directors, and therefore shareholders of M.T.s, and in that way had an interest conflicting with that of the company, and that their votes therefore could not be counted under S. 91-B. It seems to me, in the circumstances of this case, impossible to hold otherwise than that Sassoons had notice that the votes of the directors of Pratts in favour of the execution of this document, under which they claim, ought not to have been counted by reason of the provisions of S. 91-B. If that is so, the resolution of the directors of Pratts of 23rd February 1928 is void, and the execution of the mortgage in favour of Sassoons must also be void: see (1904) 1 Ch. 32 (30).

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27. Pudumjee & Co. v. Moos, 1926 Bom 28 = 91 I C 334=27 Bom L R 1218.
28. In re Marseilles Extension Railway Co. : Ex parte Credit Foncier and Mobilier of England, (1871) 7 Ch A 161=41 L J Ch 345.
29. Duck v. Tower Galvanizing Co., (1901) 2 K B 314=70 L J K B 625=84 L T 847.
29a. J. C. Honghton & Co. v. Nothard Lowe and Wills, 1928 A C 1.
30. Greymouth Point Elizabeth Railway and Coal Co. Ltd., In re, (1904) 1 Ch 32.

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It was further argued by Mr. Munshi that even if the document was void, it had been ratified by all the share-holders of Pratts. So far as the holders of ordinary shares were concerned, there may have been a ratification, because all the ordinary shares were held either by M.T.s or by their directors, but the preference shares were held by outside parties, one of whom was Mr. F. E. Dinshaw, who alone is suggested to have had notice. It is said that Mr. F. E. Dinshaw was informed that Pratts had mortgaged their property to Sassoons and that he knew that the boards of Pratts and M.T.s were common; but not only was he not told that there was any question as to the validity of this mortgage, but he was not told, as far as I can see, the fact that the mortgage was not made directly to secure a debt due by Pratts to Sassoons, but to secure a debt due by M.T.s to Sassoons, That is to say, he was not told anything to suggest that there was any conflict of interest between Pratts and M.T.s, or any reason why the execution of the mortgage should be impeached under S. 91-B. That being so, I am clearly of opinion that the view of the learned Judge was right as to this, and there is no force in the contention that the document has been ratified by the share-holders. In the result, therefore, the claim of Sassoons fails. As they had no debt apart from the mortgage deed, they have no equity to retain the documents of title of Pratts which were deposited with them. These will have to be returned to the liquidator.

Then the question arises as to the claim of M.T.s. As I have said, the power of the directors to borrow was limited by Art. 73, under which the amount borrowed by the directors for the time being remaining undischarged must not exceed rupees five lacs, the capital of the company. I have also mentioned that at the time of the liquidation the amount due to M.T.s was less than five lacs. Therefore, prima facie, there seems to be no reason for challenging the claim of M.T.s on the ground that the incurring of the debt was ultra vires. But it appears from the accounts put in by M.T.s that in previous years the borrowing did go beyond five lacs and reached, in the year 1922, thirteen lacs, and it was gradually reduced, but remained over five lacs down to the year 1928. It was argued by Mr. Coltman that by the application of some of the many equities discussed in (1914) A C 398 (3) we ought to hold that the amounts repaid were the authorized borrowing and not the unauthorized borrowing, and we ought, therefore, to come to the conclusion that the whole amount due at the date of the liquidation was the unauthorized borrowing. Why we should apply any equity in favour of his clients who borrowed the money they do not wish to repay, I do not know. It is quite clear that the rule in (1816) 1 Mer 572 (14) has no application where the question is between moneys borrowed intra vires and moneys borrowed ultra vires, in respect of which the relationship of debtor and creditor never arises. It is clear also that Pratts had the benefit of all these moneys, and as soon as the amount due came to below five lacs, the borrowing was authorized under Art. 73. I entirely agree with the learned Judge that, in so far as it is necessary to rely on any presumption, the presumption would be that the moneys repaid represented in the first place moneys borrowed ultra vires, which never became the property of the company, but remained the property of the lenders. I am not sure that in this case it is necessary to rely on any presumption, because at the material date, namely the commencement of the liquidation, Art. 73 had no application, because the debt was under the limit. I agree also with the argument of Mr. Setalvad on behalf of M.T.s that in a case where the borrowing is ultra vires the directors, and not ultra vires the company, the money could be recovered in an action for money had and received. As pointed out by the Lord Chancellor in (1914) A C 398 (3) where the borrowing was ultra vires the company, no action for money had and received lies in such a case, because the action is based on the fiction of a promise to pay, and you cannot have a fictional promise to pay where the promisor is not competent to give an actual promise. But that reasoning does not apply where the borrowing is only ultra vires the directors, so that the company can ratify the borrowing and give a valid promise to pay.

It has further been argued by Mr. Coltman in this Court, though the point does not appear to have been taken in the Court below, nor is it directly taken

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in the memorandum of appeal, that a part of the moneys due at the date of the liquidation to M.T.s represents interest on moneys borrowed ultra vires. There is, I think, some force in the contention that Pratts could not be charged with interest on moneys which for the time being had not been properly borrowed, nor, I think, could such interest be recovered in an action for moneys had and received. If that point were to prevail, I think that the liquidator of Pratts would be entitled to an account of the moneys due to M.T.s with a declaration that nothing was to be allowed in respect of interest on moneys borrowed which were for the time being in excess of five lacs. But, in my opinion, we ought not to direct such an account in this case. The point, as I have said, was not taken in the Court below, nor has it been directly taken in the memorandum of appeal ; and in the lower Court counsel for Sassoons tendered an account of Pratts in the ledgers of M.T.s, and counsel for Pratts admitted the correctness of the account, and no point was raised that any particular item in the account was wrong. No doubt it was said that the whole amount due on the account was not properly payable because it all represented moneys borrowed ultra vires. But no question was raised that a part of the moneys due at the date of liquidation to M.T.s represented interest on moneys borrowed ultra vires. I think, in view of the admission in the Court below as to the correctness of the account, and the fact that this question as to interest was not argued in the Court below nor taken in the memorandum of appeal, we ought not to direct an account now.

In the result, I agree with all the conclusions of the learned Judge in the Court below, except the conclusion that Sassoons were not fixed with notice of the disability of the directors of Pratts to vote on the resolution for the execution of the contract in suit. That being so, the appeal against Sassoons will be allowed, and the appeal against M.T.s dismissed. Declared that M.T.s are entitled to a certificate under R. 702, as unsecured creditors for the amount of their claim. The appeal against M.T.s is dismissed with costs, and the liquidator of Pratts will have liberty to pay the costs out of the assets. The appeal is allowed against Sassoons ; but having regard to the fact that they have succeeded on certain issues in the lower Court and in this Court, they ought not to pay the whole of the costs in both the Courts. Instead of apportioning costs, we propose not to vary the order of the lower Court that the costs of respondent 1 should come out of the assets, but we direct respondent 1 to pay the whole costs of the appeal against respondent 1 to the appellant.

B. J. Wadia, J.—I have come to the same conclusion. The question for decision, so far as the claim of the Sassoons is concerned, centres round the transaction contained in the deed of mortgage, dated 28th February 1928, made between M.T.s, the Pratts and the Sassoons. The claim of the Sassoons is based on this deed, and on the deed of 1931 between the same parties which was, however, only by way of confirmation. The claim was rejected by the liquidator, but the grounds for rejection have not been clearly stated in his affidavit made in these proceedings on 13th July 1933. His counsel, however, contended before us that the transaction was not binding on the company and the liquidator on the grounds, (1) that the recitals in the deed were not accurate and did not correctly represent the actual state of the dealings and business between the parties: (2) that the transaction was really a transaction of suretyship under which Pratts stood surety for payment of a debt due to the Sassoons, not by themselves, but by M.T.s, and the giving of such guarantee was ultra vires the company ; (3) that the covenant under which the Pratts and M.T.s jointly and severally promised to repay four and a half lacs to the Sassoons and the security for the repayment of the same were without consideration ; (4) that the deeds were executed in pursuance of resolutions which were not valid and binding, and that therefore the deeds were void and of no effect.

With regard to the recitals in the deed of 1928 it was argued that the figures of nine lacs and four and a half lacs were entirely imaginary, that there was no evidence of a direct specific loan of four and a half lacs from the Sassoons to the Pratts, that there was no connexion between the account subsisting between Pratts and M.T.s on the one hand and the account between M.T.s and the Sassoons on the other, and that therefore no

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relationship of creditor and debtor had been established to justify the covenant to repay the four and a half lacs and the security for repayment of the sum. It is common ground that there is no account of the Sassoons in the books of Pratts showing the Sassoons as creditors, nor any account of Pratts in the books of the Sassoons showing Pratts as debtors. But the relationship of creditor and debtor in respect of the four and a half lacs is created by the deed itself, which has been formally signed and executed by all the three companies. In that document M.T.s have acknowledged receipt of nine lacs from the Sassoons, and Pratts acknowledged receipt of four and a half lacs out of the nine lacs advanced by Sassoons to M.T.s. The recitals may not be literally correct in the sense that there is nothing on the record of the companies corresponding with what is stated in them, but they are not false in substance. To hold otherwise would be, in my opinion, to sacrifice substance to form. There is also a plain recital that Pratts required four and a half lacs for the purpose of their business, that these four and a half lacs were advanced for such purpose, and there is no evidence before us that the moneys which were within the authorized limit were not used and applied bona fide for the purposes of the company. When moneys borrowed or acknowledged to be due are within the authorized limit, there is no obligation upon the lending company to inquire how the moneys are about to be used nor how in fact they have been used. In my opinion therefore all the parties would be bound by this transaction, if it was otherwise valid.

I agree with the learned Judge in the Court below that this is not a suretyship transaction. The fact of Pratts having been described as "surety" is not conclusive as to the nature of the transaction, any more than the stamp on the document is conclusive as to what the document really is. Our attention was drawn to certain correspondence that passed before the deed was executed. But all previous correspondence was in the nature of negotiations. The negotiations became merged in the deed which after execution was the sole repository of the terms of the transaction. Under this deed the Pratts have not guaranteed the payment of the moneys due by M. T.s to the Sassoons. They have acknowledged their own liability to the Sassoons for four-and-a-half lacs, and secured repayment of that sum by deposit of title deeds of their property. It cannot therefore be said that Pratts have made their own property security for somebody else's debt when they have themselves acknowledged that they are debtors to the extent of four-and-a-half lacs, and the ruling in (1866) 14 W R (Eng) 1003 (19), on which counsel for the liquidator relies therefore does not apply. It was also argued that there was no novatio as to the four-and-a-half lacs, because M. T.s have not released Pratts of their liability for that amount, nor have the Sassoons released M. T.s. It is true that there is no express covenant in the deed that M. T.s will not sue Pratts for four-and-a-half lacs, but such a covenant is implied in the deed, for as a result of the deed M. T.s could not have sued Pratts for four-and-a half lacs, at least not for three years.

The Sassoons gave time to M. T.s to pay their debt, and an implied forbearance to sue M. T.s is sufficient consideration in law to sustain the promise by Pratts to pay four-and-a-half-lacs to Sassoons which is a part of the nine lacs advanced by the Sassoons to M. T.s. There is a tripartite arrangement in the nature of a novatio, and it cannot be said that an arrangement of this kind is ultra vires the company. This brings me to the resolution of 23rd February 1928. The alleged invalidity of the resolution seems to be the only ground which has been forcibly urged by the liquidator in his affidavit. But it is a question which really goes to the root of the whole matter. Counsel for the liquidator relied on S. 91-B and the proviso to Art. 77 of Table A, Companies Act. Ss. 91-A, 91-B, 91-C and 91-D have all been added by Act 11 of 1914. S. 149, English Companies Act, which was added in the Act of 1929, corresponds in effect to S. 91-A of our Act. There is no section in the English Act corresponding to S. 91-B. S. 91-B provides that where a director is concerned or interested directly or indirectly in a contract or arrangement with the company, he cannot vote on that contract or arrangement; and the proviso to Art. 77 in Table A says in effect the same thing, except that the words in the section are 'contract or

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arrangement', and the words in the article are 'contract or work.'

It is clear that the interest of the director in the transaction must be personal, and either pecuniary or material. It may be direct or indirect, but it must be adverse to the company of which he is a director. The principle on which it is based has been well recognised, and it is so strict and inflexible that even the fairness or unfairness of the transaction is immaterial. For instance, directors have been held to be incompetent to vote on giving a debenture security to two of themselves in consideration of a large sum of money owing to them: (1904) 1 Ch 32 (30). They cannot vote on an issue of debenture to secure an over-draft account with the bank which was guaranteed by themselves personally: (1927) 1 Ch 323 (31). A director cannot vote on an allotment of shares to himself: 23 Bom L R 1104 (32). The reason in all these cases is that the company is entitled to the unbiassed judgment of its directors on matters affecting the interests of the company. As pointed out by the Vice-Chancellor in (1842) 1 Y & C C C 326 (33), the company has a right to the entire services of its directors, a right to the voice of every director, and a right to his advice in giving his opinion on matters which are brought before the board for consideration. S. 91-B, Companies Act, enforces a statutory prohibition which is somewhat stringent, and it was pointed out in argument in 37 C W N 126 (34) at p. 128 that the case to which it should be applied must fall strictly within its purview.

The liquidator contends that the resolution of 23rd February 1928 is invalid, because the directors of Pratts were not competent to vote on a resolution for executing the deed, having regard to their common interest in M. T.s, and that the Sassoons had notice, actual or constructive, of the facts going to invalidate the resolution. The five directors of Pratts, who were present at the meeting of 23rd February and voted on the resolution of 5 p.m., passed exactly the same resolution as directors of M. T.s in the same building at 5-15 p.m. Moreover, the directors of Pratts were interested in M. T.s either as shareholders or as directors of M. T.s. One of the directors of Pratts was Mr. A. J. Raymond, who was also the managing director of the Sassoons. Under a resolution of the Sassoons of 3rd February 1921, he was empowered to exercise the full powers of the entire board of directors of the Sassoons, and, according to the evidence given in these proceedings by the head accountant of the Sassoons, he was in charge of the business of the Sassoons as managing director from its inception. There was no doubt a common board between M. T.s and Pratts, also a common secretary and a common management. It was argued on behalf of the liquidator that there was no independent person present to vote on the resolution giving the security of Pratts' property to the Sassoons. and that all the directors were therefore disqualified to vote. There was no quorum competent to transact business, and therefore the resolution was invalid, and the deed executed in pursuance thereof was a nullity.

On the other hand counsel for the Sassoons argued that the question of the disqualification of the directors of Pratts, the question whether the meeting was properly called, the question whether there was a proper and competent quorum qualified to vote on the resolution, are all matters of internal or indoor management of the company, and do not affect the validity of the contract or transaction so far as outsiders are concerned under the ruling in 6 El & Bl 327 (1), and a company is bound by its own resolution. A person dealing with limited liability companies is deemed to have notice of its memorandum and articles of association, but he is not bound to inquire into the internal management, and will not be affected by any irregularity of which he has had no notice. He has a right to assume that nothing has been done or permitted to be done which is not permitted by the memorandum and articles of association or by the statute incorporating the company itself. But actual or constructive notice of any irregularity prevents a third person contracting with the company from obtaining the protection of the rule in 6 El & Bl 327 (1)

31. Victors Ltd. v. Lingard, (1927) 1 Ch 323=96 L J Ch 132=70 S J 1197=136 L T 476.
32. In re Hormusji A. Wadia, 1921 Bom 372=64 I C 933=23 Bom L R 1104.
33. Benson v. Heathorn, (1842) 1 Y & C C C 326.
34. Guntur Cotton, etc., Mills Co., Ltd. v. Venkatachalapati, 1932 P C 244=139 I C 556=37 C W N 126 (P C).

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namely, that all matters of internal or indoor management must be deemed by outsiders to have been duly and properly complied with. Such notice, as I have said, may be actual or constructive. If the outside party is put on inquiry by reason of the circumstances under which the transaction was put through, or by the nature of the transaction itself, or by any other surrounding circumstances, and disregards the facts which put him on inquiry as to the irregularity, he cannot get the benefit of the rule.

The question, therefore, in this case is whether the Sassoons had notice of the irregularity, that is, notice of the disqualification of the directors of Pratts to vote on the resolution, under the terms of S. 91-B of the Act. Mr. A. J. Raymond was a common director of all the three companies, but it was said that he was present at the meeting of 23rd February 1928, in his capacity as director of Pratts only, and that he was not bound to communicate his knowledge of any irregularity derived in that capacity to the Sassoons. It has been laid down in numerous cases that the knowledge of the common officer of two companies is not necessarily the knowledge of both the companies, and counsel contended that it did not follow that the Sassoons therefore had notice of every fact that happened to be known to Mr. A. J. Raymond: (1896) 2 Ch 743 (24); (1871) 7 Ch A 161 (28). But in (1928) A C 1 (29a) Viscount Dunedin points out at p. 14 that it may be assumed that the knowledge of directors is in ordinary circumstances the knowledge of the company, and Viscount Sumner points out in the same case at p. 19 that what a director knows or ought in the course of his duty to know may be the knowledge of the company, for it may be deemed to have been duly used so as to lead to the action, which a fully informed corporation would proceed to take on the strength of it. The position of Mr. A. J. Raymond when he sat as a director of Pratts on 23rd February 1928, is of importance in this connection. The Sassoons were vitally concerned in the equitable mortgage which Pratts were to give to them. There was previous correspondence between the companies about it. Mr. Raymond was not merely a common director, but he was also present there as manager of the business of the Sassoons, and this certainly was a business transaction, not of Mr. A. J. Raymond, personally, but of the Sassoons. He knew or must be presumed to have known that there was a common board of Pratts and M. T.s, though he may not have appreciated the legal significance of that fact nor thought it his duty to communicate it to the Sassoons. There were other circumstances surrounding the transaction which were sufficient to suggest further inquiry.

The two resolutions passed on the same day are mentioned under the seals of M. T.s and Pratts which were affixed to the deed itself. The learned Judge in the Court below has stated that if this transaction could have been put through by two documents, it might as well have been put through by one, and there was nothing unusual in its nature as a business transaction. The form may not be unusual, but the question is not one merely of form. A transaction which may be effected by two documents may well be effected by one, but the doubt as to the validity of the transaction as embodied either in one document or two documents will still remain under the circumstances which I have referred to before. In my opinion it was Mr. Raymond's duty as manager of Sassoons for all business purposes to act not merely for the purposes of receiving information but also for the purpose of communicating it. It is really difficult to believe that there was a situation on 23rd February when it could be said that Mr. Raymond had notice only as a director of Pratts, and had no notice as managing director of the Sassoons and as manager of their business. The Sassoons also were bound to inquire into the title to their mortgage, and the title to the mortgage was based upon the validity of the resolution. There was no independent board, and no meeting of the share-holders was called to ratify the transaction. Therefore, under all the circumstances, the Court can impute knowledge of the irregularity to Sassoons. Counsel for the liquidator also relied on S. 87, Companies Act, under which the list of directors filed with the Registrar is open to inspection, but it was pointed out in 27 Bom L R 1218 (27) that notwithstanding S. 87 the appointment of directors was still a matter of the internal management of the company, and an outsider could not be expected also to search the register for the list of directors.

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I do not agree with counsel for the Sassoons that the transaction was ratified by all the share-holders of Pratts by acquiescence. There can be a ratification either with full knowledge of the transaction or with the intention to adopt the transaction under any circumstances. It cannot be said that Mr. F. E. Dinshaw, and two others who were joint holders of preference shares on behalf of the Gwalior State had full knowledge of all the circumstances attending the transaction or were put upon inquiry. It was argued that if he had not the knowledge, he had the means of knowledge. But a person can only be put on inquiry if there are facts communicated to him which may lead to a further inquiry. He was not put on inquiry merely as a share-holder. Reference was made to two letters of 28th February and 3rd March 1928, written to him by H. M. Mehta & Co., the managing agents on behalf of Pratts. There was no reply to either of them ; but from that it cannot be inferred that he manifested an intention to adopt the transaction. In my opinion the letters are not sufficient evidence on which any Court can base a finding of standing by or acquiescence on the part of Mr. F. E. Dinshaw.

The claim of the Sassoons is based on the deeds. The deeds not being valid and binding for the reasons above stated, they cannot have any claim either as secured or unsecured creditors, for the debt as well as the security are created by the deed of 1928. This brings me to the claim of M. T.s which is really an alternative claim. It is stated in para. 7 of the affidavit of Mr. J. M. Taleyarkhan, dated 7th July 1933, that in the event of the claim of Messrs. E. D. Sassoon & Co. Ltd., being admitted, M. T.s will not claim the amount over again. Art. 73 of Table A has already been referred to and I need not recite it again. It fixes the directors' limit of borrowing at five lacs. It was however argued that the borrowings by Pratts were far in excess of the limit of five lacs, but in my opinion there is no ground for assuming that the claim now made, which is below the limit, represents the balance of unauthorized borrowings. It was further argued that the Pratts should not in any event be charged with interest on that portion of the claim which may represent interest on their unauthorized borrowings. That contention, however, was never put forward in the Court below. It has not been mentioned in the judgment. It is not taken in the memorandum of appeal. Even in the affidavit of the liquidator himself of 13th July all that is stated is as follows :

> The petitioners contend, and I am advised with reason, that as the payments made by the company from time to time to M. T. Ltd., in liquidation of the account would discharge the borrowings from M. T. Ltd., in order of time, the ultimate balance left unpaid represents the final borrowings, and therefore the balance shown as now due in the account of M. T. Ltd., represents the last borrowings by the management of M. T. Ltd., in excess of the powers of the board of directors to borrow, and therefore represents unauthorized and ultra vires borrowings by which the company is not bound.

The claim of M. T.s was disputed on principle, and not in respect of the quantum, in the course of the hearing, and no one contended in the Court below that an account should be taken of what was due to M. T.s in respect of their claim. The account of the Sassoons in the ledgers of M. T.s and the account of Pratts in the ledgers of M. T.s were put in, and their correctness was admitted. Counsel for the liquidator argued that all that was meant by the admission was that the accounts were not to be formally proved. If that was so, the note taken by the learned Judge would not have been in that form. The accounts would only have been put in by consent without proof. I therefore hold that the liquidator is not now entitled to have any account taken of the sum due to M. T.s in respect of their claim. The claim is within the authorized limit. The moneys were borrowed and used according to the balance-sheets of Pratts for their business. There was therefore an implied promise by the Pratts to repay all that had gone into their coffers. In my opinion no account should now be ordered, and the amount of the claim should be taken as correct. It has been held that an account for money had and received cannot lie in the case of an ultra vires borrowing : (1914) A C 398 (3). But the amount claimed by M. T.s is within the limit, and Pratts are bound to repay the sum. For these reasons I agree with the conclusion that the claim of the Sassoons should be rejected, and the claim of M. T.s allowed. In the result the appeal would be allowed so far as the claim of the Sassoons is concerned and dismissed so far as the claim of M. T.s

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is concerned. I agree with the order for costs made by the Chief Justice.

B.D./R.K. *Order accordingly.*

A. I. R. 1936 Bombay 88

BEAUMONT, C. J. AND BLACKWELL, J.

Abdul Rehman Mohamud Yusuf and *others*—Plaintiffs—Appellants.

v.

Phiroze Cursetji Sethna and *others*—Defendants—Respondents.

O. C. J. Appeal No. 18 of 1935, Decided on 8th October 1935, from Suit No. 274 of 1934.

(a) Lease—Direct covenant between lessor and lessee—Lessor accepting rent from assignee of lessee—Lessee is not released from his personal covenant.

Where there is a direct covenant by the lessee to pay to the lessor, the rent, during the whole currency of the term of the lease, mere acceptance of rent frcm an assignee of the lessee by the lessor will not relieve the lessee from his personal covenant. The English rule of reddendum does not apply to such cases where there is direct covenant between the lessor and the lessee. [P 89 C 2]

(b) Lease—Right to property—Assignment of lease by lessee and of reversion by lessor —Only rights running with the land pass.

The words "all the rights of the lessor as to the property" in S. 109, T. P. Act, clearly include rights of the lessor under covenants affecting the demised property, that is,—to use the English expression,—under covenants "which run with the land" and that no other rights pass. Only covenants, the benefit of which passes to the transferee, are covenants running with the land. A purely personal right against the original lessee, who has parted with the land, is not a right of the lessor as to the property. The sole right, which the lessor has against him, is a personal right, arising under the contract, for damages ; and that is not a right of the lessor "as to the property." [P 90 C 2; P 91 C 1]

K. McI. Kemp and *N. P. Engineer*—for Appellants.

F. J. Coltman, M. C. Setalvad and *M. L. Maneksha*—for Respondent 1.

Beaumont, C. J.—This is a suit in which the six plaintiffs sue the defendants for rent under a lease dated 22nd January 1922. Defendant 1 is the original lessee under the lease, and he is sued by virtue of his express covenant to pay the rent. Defendant 2 is the assignee of the lease, and as against him a decree for payment of the rent was granted, and from that decree there is no appeal. Defendants 3 and 4 were sued in the capacity of partners with defendant 2. The suit was dismissed against them, and there is no appeal from that dismissal. So that the only question with which we have to deal on this appeal is the liability of defendant 1 on his express covenant for payment of the rent. The matter is one of very great importance to the parties, because the rent reserved under the lease was over Rs. 16,000 per month; the property, we are told, has fallen very much in value and cannot be underlet at anything like the rent reserved by the lease, and defendant 2 is not in a position to meet his liability. The lease in question which, as I have said, was dated 22nd January 1922, was made between Sir Mohamud Yusuf (who is plaintiff 6), who is referred to as "the landlord,"—that expression to include "the reversioner for the time being immediately expectant upon the term hereby created," —of the one part, and defendant 1, therein called "the tenant,"—which expression was to include "his heirs, executors administrators and assigns," of the other part. The term of the lease was fifty years, commencing on the day on which the building to be erected was completed and that date was subsequently agreed between the parties as 16th August 1923; and the rent reserved was the monthly rent of Rs. 16,667. The covenant for payment of rent was in these terms :

> The tenant for himself, his heirs, executors, administrators and assigns and to the intent that the obligations may commence from the beginning of and continue throughout the term hereby created covenants with the landlord as follows : (a) To pay the reserved rent on the days and in manner aforesaid at the office of the landlord in Bombay.

The only other covenant, which it is material to notice, is that against assigning without the written consent of the landlord—such consent not to be unreasonably withheld. On 5th September 1923, that is, shortly after the term of the lease had commenced, defendant 1 applied in writing to the landlord for liberty to assign the lease to defendant 2, and on 24th September 1923, a reminder was sent to the landlord. On 28th September 1923 the landlord wrote to defendant 1 :

> With reference to your letter dated the 5th instant, I have no objection to your assigning the lease of the Yusuf Building to Sir Fazulbhoy Currimbhoy, Kt., provided you send me within two days the rent from 16th August to 30th instant as agreed.

The rent was not sent within the time specified, but on 5th October 1923 Sir

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Fazulbhoy Currimbhoy, defendant 2, sent the rent for the building due from August 16 to the end of September 1923 that is, the rent due from the commencement of the term down to date; and thereupon, on 17th October 1923 the agent of the landlord wrote to defendant 1:

As per your request we have consented to the lease being assigned. Will you kindly let me know under what arrangement the lease was assigned.

And the answer to that from defendant 1 was that "I have absolutely transferred my entire interest in the lease to Sir Fazulbhoy Currimbhoy, Kt." In fact, the lease was not actually assigned until 28th March 1924 when there was a deed of assignment between defendant 1 and defendant 2. The landlord was not a party to that deed, and therefore there is no question of defendant 1 being released from his obligations under the lease by that deed. Then on 29th April 1929 the lessor, that is, plaintiff 6, assigned the reversion in this property to himself and others by way of wakf, and the six plaintiffs are now the persons entitled to the reversion as mutawallis of the wakf. The relevant terms of the assignment are that

the Wakif (that is plaintiff 6) doth hereby grant, convey and assure unto the Mutawallis subject to all leases and tenancies now subsisting in respect thereof all the said lands, hereditaments and premises described (which included the property, the subject-matter of the lease in question), together with rights, liberties, easements, profits, privileges and appurtenances whatsover to the said lands hereditaments and premises or in anywise appertaining or with the same or any part thereof now or at any time heretofore usually held, used, occupied or enjoyed and all the right, title and interest, claim and demand whatsoever of him the Wakif into or upon the said lands, hereditaments and premises hereby granted, conveyed or assigned.

Those are all the documents which are relevant to the question which we have to decide. The learned Judge held two points in favour of defendant 1. He held, first of all, that the plaintiffs were not entitled to sue, because they were not the assignees of or entitled to enforce, the covenant of defendant 1 to pay the rent, and, secondly, that defendant 1 had been released from his obligations under the lease. I will deal with the second point first. S. 108, T. P. Act, which deals with the rights and obligations as between a lessor and a lessee, provides in sub-s. (j) that:

The lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease.

That provision seems to me to introduce the English rule, which is well established, that the lessee remains liable on his covenants contained in the lease notwithstanding an assignment. That English rule, to my mind, admits of no doubt whatever. It has been established in great many cases, and is referred to in all the text-books: and I think the passage which the learned Judge in his judgment in the Court below quotes from the judgment of Sir John Wallis in 40 Mad 1111 (1), namely (p. 1113)

that the lessee does not cease to be liable on the lease by reason only of an out and out assignment, but he will, as in England, cease to be liable if the lessor accepts rent from the assignee and thereby creates a privity of contract between them,

had reference to English cases in which there was no express covenant to pay the rent, but the liability of the lessee arose only under the reddendum. It is well settled that an action for rent on the reddendum is an action of debt which depends upon privity of estate, and that action does not lie after the assignment by the lessee of his interest in the lease. But that principle has no application where, as here, you have a direct covenant by the lessee to pay the rent during the whole currency of the term, and the action, under the old forms of pleading would have been in covenant. The mere acceptance of rent from the assignee cannot affect the question, because the assignee normally pays the rent after assignment. The learned Judge, I would add, does not really dispute that proposition. But he holds that there is in this case something beyond the assignment, namely a release of the lessee from his liability. In so holding, he relies on the evidence of defendant 1. The relevant evidence seems to me to come to this. Defendant 1 says that he had arranged for the assignment of this lease somewhere about the end of February 1923, that is to say, before the commencement of the term, and that thereafter all his negotiations with the lessor were in fact made on behalf of the intended assignee, that is, defendant 2. Then he says that some

1. Thethalan v. Eralpad Rajah, Calicut, 1918 Mad 425=40 I C 841=40 Mad 1111=32 M L J 442.

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time early in March 1923, he met the agent of the landlord and said to him something to this effect:

> I want the landlord to allow me to assign the lease to defendant 2 and to treat him as a tenant in my place.

Defendant 1 said very candidly in the witness-box that that conversation took place a long time ago, and he could not remember any details. He could not remember where the conversation took place or whether anybody else was present, and he does not purport to remember the exact expressions used at that interview. But I am quite willing to take it that substantially his recollection is right, and that he did say something like this that : "I want the landlord to accept defendant 2 as tenant in my place." But that, to my mind, as between laymen, is really no more than an application for a consent to an assignment; and I think the fact that the parties had no more than this in mind is made perfectly plain by the subsequent correspondence, to which I have in part referred. That correspondence shows clearly that the landlord was during the months of August and September 1923, looking to defendant 1 as the lessee to pay the rent, and defendant 1, so far as his relations with the landlord were concerned, was admitting that he was the tenant of the property. When one comes to the actual request for leave to assign, there is no mention whatever of any release of the lessee from his covenants in the lease. Probably the parties did not appreciate that defendant 1 would remain liable on his covenants after the assignment, but whatever the reason may have been, I am confident that in fact they never dealt with any question of the release of defendant 1. Even if one takes the arrangement made between defendant 1 and the agent of the landlord as an arrangement that defendant 2 should be substituted as the lessee for defendant 1, that substitution never took place. Defendant 1 never procured defendant 2 to enter into any personal covenant with the lessor. There never was, therefore, in law any substitution of defendant 2 for defendant 1 as the lessee under the lease. I am clearly of opinion, therefore, that the learned Judge's finding that there was a release, express or implied, or a discharge under S. 63, Contract Act, of defendant 1 from his obligations under the covenants in the lease is not sustainable, even if evidence on the subject can be given in view of proviso 4 to S. 92, Evidence Act.

Then the second point which arises is as to whether the plaintiffs can sue defendant 1 on his covenants in the lease, whether, that is, the right by privity of contract has passed to them. I agree with the construction placed by the learned Judge on the deed of wakf. I think that it is impossible to hold that that deed contains any express assignment of the benefit of the lessee's covenants under the lease. The only question, therefore, is whether the benefit of those covenants passed to the plaintiffs by operation of law and that involves the construction of S. 109, T. P. Act. As I have mentioned, S. 108 deals with the general rights between the lessor and the lessee, and the whole of that section is subject to any contract to the contrary. Then S. 109 deals with the position under an assignment of the reversion. It provides :

> If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it ; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him.

Now the question we have to determine, as it seems to me, is whether the right sought to be enforced against defendant 1 is a right of the lessor as to the property transferred. If it is, the plaintiffs can enforce that obligation by virtue of S. 109. I think the words "all the rights of the lessor as to the property" clearly include rights of the lessor under covenants affecting the demised property, that is—to use the English expression—under covenants "which run with the land," and that no other rights pass. The concluding words of the section, which leave the lessor liable after the assignment "to any of the liabilities imposed upon him by the lease," would seem to be wider and to leave him liable under personal obligations which do not run with the land. But in my view the only covenants the benefit of which passes to the transferee are covenants running with the land. Mr. Coltman argued that the

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rights of the lessor as to the property did not include any obligation arising by contract, but I think that would be far too narrow a construction to place upon the section. If that were the right construction S. 109 would only cover rights arising under S. 108, which, as I have said, is subject to any contract to the contrary. So that, where, as in the present case, the lease contains express covenants for payment of rent, repairs, and so forth, the provisions of S. 108 are excluded, and the benefit of none of the covenants would pass to the transferee under S. 109. I am of opinion that that is not the meaning of the section, and that the transferee of the reversion becomes entitled, after the transfer, to enforce covenants in the lease which run with the land.

But then the question arises, can it be said that a purely personal right against the lessee, after he has assigned his interest in the term, is a right of the lessor as to the property? I confess that I feel considerable doubt on the question. On the whole, however, I have come to the conclusion that on a fair reading of the language, one cannot say that a purely personal right against the original lessee, who has parted with the land, is a right of the lessor as to the property. Whilst the lessee is in possession of the property, undoubtedly the covenant to pay rent, which issues out of the property, is a covenant which runs with the land; and I apprehend that if the rent were a rent payable in kind, for instance, that the lessee would hand over to the lessor a certain proportion of the produce of the land,—that covenant could be enforced specifically in a proper case. But it is obvious that where the lessee has parted with all interest in the land, the only right which the lessor can have against him is a right to damages for breach of covenant. The lessee cannot in fact pay the rent, if he is not entitled to the land, and cannot collect the rent issuing out of the land. The sole right, which the lessor has against him, is a personal right, arising under the contract for damages; and that is not in my view a right of the lessor "as to the property."

The law which preserves the personal liability of the lessee on his covenants throughout the term of the lease often occasions considerable hardship; and I see no reason why we should apply that branch of the law to a case not clearly falling within it. It is to be noticed that the words of S. 109, T. P. Act, are a good deal narrower than the words of S. 141 of the English Law of Property Act, 1925, which was in force when the Transfer of Property Act was amended. That section provides that:

> The rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained shall be annexed and incidental to and shall go with the reversionary estate in the land.

The language of that section substantially follows the language of the earlier enactments on the subject, 32 Henry VIII, c. 34, and S. 10 of the Conveyancing and Law of Property Act of 1881, both of which refer to the benefit of the covenants in the lease relating to the property passing to the reversioners. S. 109, T. P. Act, does not provide that the benefit of the covenants under the lease affecting the property are to pass; it only says that the rights of the lessor as to the property are to pass. Even under the English Acts we have only been referred to one case, namely the case of 10 Q B D 48 (2) at p. 50, where it was held that the lessee could be sued on his personal covenant by an assignee of the reversion, after the lessee had parted with the whole of the term. Then there is one other point to be noticed, namely, that one of the plaintiffs No. 6, is the original covenantee under the lease, and he has applied for leave to amend the plaint by submitting, first, that the benefit of the covenant for payment of rent was transferred to and became vested in the original six plaintiffs, and then by claiming that if and so far as it may be held that it was not so transferred, plaintiff 6 may recover for the benefit of the plaintiffs the said sum from defendant 1. In my opinion, the proposed amendment cannot be allowed, because it would involve misjoinder of causes of action. As I pointed out at the commencement of my judgment, this was not in its inception a plain suit between the plaintiffs and defendant 1 on his personal covenant. There was also the claim against the other defendants as the assignees of the lease; and the plaintiffs

2. Mayor of Swansea v. Thomas, (1882) 10 Q B D 48=52 L J Q B 340=47 J P 135=31 W R 506 =47 L T 657.

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have got a judgment against defendant 2 for the amount of the rent. If we were to allow the amendment, and hold the claim of plaintiff 6 established, the result would be to combine two judgments into one, first a judgment in favour of plaintiffs against defendant 2, and, secondly, a judgment in favour of plaintiff 6 against defendant 1. That would really be converting this action into two actions by different plaintiffs against different defendants, and in my opinion, we are not justified in doing that. I think, therefore, that the leave to amend must be refused, and that being so, it is not necessary or proper in this suit to consider what the rights may be as between plaintiff 6 and defendant 1 alone. On these grounds the appeal must be dismissed with costs.

Blackwell J. — I am of the same opinion. I cannot agree with the learned Judge that the evidence in this case establishes that there was in fact a release by plaintiff 6, the original lessor of defendant 1, of all his liabilities under the personal covenants in the lease. Taking the evidence given by defendant 1 as a whole, and accepting it as perfectly truthful from beginning to end, it does not appear to me to establish that defendant 1 and plaintiff 6's agent were at all directing their minds to the question whether defendant 1 should be released from his liabilities under the personal covenants in the lease. It must be remembered that they were laymen, and not lawyers, and in my opinion, the evidence merely establishes that defendant 1 was anxious to secure the assent of plaintiff 6 to the assignment of the lease as early as March 1923. That view of the evidence is, I think, entirely borne out by the letters which subsequently passed between defendant 1 and plaintiff 6 in regard to the request for consent to an assignment of the lease. If there had been, as early as March, any agreement by plaintiff 6 to release defendant 1 entirely from all his personal covenants under the lease, I cannot think that the letter of defendant 1, dated 5th September 1923, would have been written in the form in which it was written, namely, as a mere request for consent to an assignment, without any reference to the fact,—if it were a fact,—that plaintiff 6 had already released defendant 1 entirely from liability under the lease. That view of the evidence is also, in my opinion, borne out by the written statement in which there is not a hint or suggestion that any oral agreement for a release, had been arrived at. Consequently, with respect to the learned Judge, I think he came to a wrong conclusion on the question of fact, and that there was no release.

Even if the oral evidence had been of a character to establish, though I think it was not, any such agreement, it would in my opinion, have not been open to defendant 1 to give such evidence, having regard to proviso (4) to S. 92 of the Evidence Act, inasmuch as it would amount, in my opinion, clearly to a subsequent oral agreement to rescind or modify a contract, grant or disposition of property, where the contract, grant or disposition of the property was required by law to be in writing or had been registered according to the law. In the present case, there was an agreement in writing, namely the lease, and it had been registered. Therefore, that proviso would, in my opinion, clearly be a bar to the proof of such an agreement. The terms of S. 63, Contract Act, were relied upon on behalf of defendant 1 under which it is provided that :

> Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

It was argued that it was not necessary, having regard to that section, to rely on the terms of any agreement to release, if the section were otherwise applicable ; and a decision of the Privy Council in 55 I A 154 (3) was relied on. It was contended that inasmuch as from the very commencement the rent had in fact been paid by defendant 2, and the rent bills had always been made out in his name, an inference ought to be drawn that plaintiff 6 had by his conduct released defendant 1 from performance of the promise made by him under the lease. In my opinion, that is not an inference which is warranted by what happened. Plaintiff 6, it is clear, was willing to consent to the assignment, and —as constantly happens in the case of assignment,—he thereafter received rent from the assignee. But, in my opinion,

3. Chunna Mal-Ram Nath v. Mool Chand-Ram Bhagat, 1928 P C 99=108 I C 678=55 I A 154=9 Lah 510 (PC).

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the mere receipt by him of rent from the assignee does not warrant the inference that he thereby released defendant 1 from his personal covenant to pay the rent during the whole of the term—a covenant which, no doubt, plaintiff 6 would only seek to enforce if the rent had ceased to be paid, as in fact happened in this case, by defendant 2 ceasing to pay. In my judgment, the mere acceptance of the rent by plaintiff 6 from the assignee certainly did not amount to a release of the covenantee from future performance of the obligation under the lease.

It was argued that the receipt of rent by plaintiff 6 from defendant 2 amounted in law to a release of defendant 1 and that acceptance of rent established privity of contract between plaintiff 6 and defendant 2 and put an end to the contract between plaintiff 6 and defendant 1, with the result that the plaintiffs were not in a position to enforce payment of rent from defendant 1. Mr. Coltman in that connexion relied upon a passage in the judgment of Baron Pollock in (1882) 10 Q B D 48 (2). That was a suit against the original tenant under a lease, which contained a covenant to pay the rent. The defendant had assigned all her interest in the term, but rent had not in fact been accepted from the assignees of the lessee. In the course of his judgment, Baron Pollock said as follows (p. 50) :

On the part of the defendant it was contended, first, that the plaintiffs, upon the facts stated, must be taken to have recognised Watson and Overend as their tenants, and therefore that they could not now maintain an action against the defendant for the rent sued for. If the plaintiffs had received rent from the defendant's assignees, this might have been so, because by so doing they would be taken to have accepted the assignees as their tenants, and so privity of contract between the plaintiffs and the defendant would have been extinguished, in accordance with the well-known doctrine laid down in 76 E R 676 (4), but it was admitted by counsel for the defendant that no rent had ever been paid by the assignees, and the defendant's name still stood as tenant in the books of the corporation.

With great respect to the learned Baron, in my opinion, the law is not as there laid down by him. In note (C. 1) to 76 E R 676 (4), it is stated that

. . . it is fully settled, that though, if the lessor accept the assignee as his tenant, he cannot bring an action of debt for rent incurred after the assignment, because the acceptance of rent extinguishes the privity of contract which was created between them by the lease; yet he may have an action of covenant upon the express covenant by the lessee to pay the rent

and (1612) Cro Jac 309 (5), (1630) Cro Cur 188 (6), (1841) 1 Saund 237 (7) and (1812) 4 Taunt 642 (8), are there referred to in support of that proposition. I think it is clear law that though the action of debt is not maintainable if rent is accepted from the assignee of the lessee, yet where there is a personal covenant, that personal covenant remains, and may be enforced by action. The further question, however, remains as to whether the present plaintiffs, who are the assignees of plaintiff 6 under the deed of wakf dated 29th April 1929, can enforce a personal covenant for rent against defendant 1 after he has assigned the property to defendant 2. I entirely agree with the observations which have fallen from the learned Chief Justice as to the effect of the provisions of that deed in regard to the personal covenant. In my opinion, the benefit of that personal covenant was not assigned by that deed in any shape or form. Consequently, the question depends for its answer upon the proper construction to be put upon S. 109, T. P. Act, which provides in the case of a transfer by a lessor of the property leased or any part thereof that the

transferee, in the absence of a contract to the contrary, shall possess all the rights, and if the lessee so elects, be subject to all the liabilities, of the lessor as to the property or part transferred, so long as he is the owner of it.

Can a mere personal covenant to pay rent be regarded as a right as to the property within the meaning of that section which can be enforced against the lessee after he has parted with all his interest in the property? It is to be observed that when liabilities attaching to the lease are intended to be referred to, the legislature has no difficulty in referring to them in terms. For instance, in dealing with the rights and liabilities of a lessee, who transfers the whole or any part of his interest in the property, under S. 108 (j), T. P. Act, where the legislature desires to refer to the liabilities of the lessee attaching to the lease, it does so in terms, and provides that

the lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease.

4. Walker's case, (1587) 76 E R 676.
5. Barnard v. Godscall, (1612) Cro Jac 309.
6. Bachelour v. Gage, (1630) Cro Cur 188.
7. Thursby v. Plant, (1841) 1 Saund 237.
8. J. W. Orgill v. Kemshead, (1812) 4 Taunt 642.

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Similarly, in the latter part of that portion of S. 109, to which I have already referred, the legislature refers to the "liabilities imposed upon him by the lease," where it provides that :

The lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him.

The expression "rights as to the property" would, no doubt, include covenants running with the land. But, in my opinion, it would be an odd thing, if it were intended to include a personal liability on the part of the lessee to pay rent, when he had assigned the land, with the result that privity of estate had been established between the lessor and the assignee. I think it would be straining the fair meaning of the words to treat a personal covenant to pay rent as covered by the expression "rights as to the property." In my judgment, if the legislature had intended that the transferees of the reversion should have the right to enforce against the original lessee—even after he had assigned the property, a personal covenant between him and the original lessor to pay the rent—it would have done so in plain and unambiguous language. I feel that the matter is certainly not free from doubt. But I am not prepared to hold on the language used that a personal covenant to pay rent falls within the words "the rights as to the property," so as to confer upon the transferees of the reversion the right to enforce, what is after all merely a covenant for damages against the original lessee, after he had assigned the property. In my opinion, therefore, the learned Judge came to the right conclusion upon this part of the case; and the appeal should be dismissed with costs.

B.D./R.K. *Appeal dismissed.*

✻✻ A. I. R. 1936 Bombay 94

BLACKWELL, J.

Harkisandas Dharamsey—Plaintiff.

v.

Dwarkadas Gordhandas and *others*—Defendants.

O. C. J. Suit No. 1781 of 1934, D/- 15th March 1935.

✻✻ Attestation—Document requiring registration should be complete before presenting for registration—Enquiry by Registry Officer is for knowing identity of executant —Endorsements under S. 58, Registration Act, do not amount to attestation—Signature of Registrar is not of attesting witness.

What takes place before the registering officer has nothing to do with attestation, and cannot be looked at for the purpose of proving attestation of a document which requires to be registered. The duty imposed upon the registering officer by S. 34, is to enquire whether or not the document was executed by the person by whom it purports to have been executed, and to satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document, and any enquiry held by the registering officer is directed to those matters and not to attestation. And though the registering officer is bound by S. 59 to affix the date and his signature to all endorsements made in his presence, he is not bound to do so at the time they were made, and will comply with the section if he does so on the same day, at a time when the persons who made the endorsements may not be present. S. 59 does not contemplate that the signature of the registering officer to any endorsement is to be treated as that of an attesting witness in connexion with an admission of execution. S. 47, Registration Act, assumes that the document which is sought to be registered is a document complete in all essentials before it is presented for registration : 1932 *All* 527 (*F B*), *Foll.*; 1929 *Mad* 1 (*F B*), *Dissent.* [P 96 C 1]

K. McI. Kemp—for Plaintiff.

K. M. Munshi—for Defendants.

Judgment.—This is a vendor and purchaser summons raising a question whether the defendants have made out a marketable title to certain leasehold property, which by an agreement in writing dated 21st July 1934, the plaintiff agreed to purchase from the defendants and one Tulsidas Valji. The title begins in the year 1901 with a mortgage, Ex. A, which was executed by Omar Pir Mahomed, the then owner, on 21st December 1901, in favour of Dossibai Nawroji Gazdar. At the foot of the witness clause the mortgage was signed by Umar Pir Mahomed in the presence of one attesting witness only, and the point is taken that by reason of that fact, it is not a valid mortgage. Below that signature and attestation appears a receipt clause whereby the mortgagor on the very same day on which he signed the document, admitted the receipt of Rs. 20,000, signing his name below the words "I say received," and that was witnessed by two persons, one of whom, Mr. Rustomji Fardunji Mulla, had previously attested the mortgagor's signature to the execution of the document. It is contended on behalf of the defendants that the attestation to this receipt clause is a sufficient attestation to comply with S. 59.

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T. P. Act. On the same day, namely 21st December 1901, as appears from the last page of the mortgage, certain endorsements were made in the office of the Sub-Registrar of Bombay. The first is in these terms:

Omar Peer Mahomed executing party timber-merchant, residing at Memon Mohola, admits execution.

and below that is the signature of the mortgagor. Then comes another endorsement in these terms :

Mr. Sakarlal Jayantilal, clerk to Messrs. Mulla and Mulla, Solicitors, residing at Bhooleshwar and known to the Sub-Registrar, examined as to identity of the above executant.

Below that appears the signature of Sakarlal Jayantilal, and below his signature is the signature of the Sub-Registrar of Bombay. It is contended on behalf of the defendants that this is an attestation sufficient to comply with S. 59, T. P. Act. The last endorsement on the mortgage is a statement that it was registered on 3rd January 1902, and the document is signed by the Sub-Registrar to that effect on that date. S. 59, T. P. Act, provides that a mortgage of the character with which this case is concerned

can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

What is meant by "attested" appears in S. 3 of the Act as follows :

'Attested' in relation to an instrument, means (and shall be deemed always to have meant) attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant. . . . .

The point which has been argued is whether that section implies the completion of the document by signature and attestation before it is presented for registration, or whether, as contended by Mr. Munshi for the defendants, if the document has not been attested before presentation to the Sub-Registrar, the endorsements made in the office of the Sub-Registrar may be looked at to prove attestation. Before dealing further with this question, I will first give my opinion as to the effect of the receipt clause. Looking to the definition of "attested" in S. 3, T. P. Act, the relevant words in this connexion are :

or has received from the executant a personal acknowledgment of his signature or mark. . . . , and each of whom has signed the instrument in the presence of the executant.

Mr. Munshi has to satisfy me that the two witnesses, who put their signature at the side of the mortgagor's signature below the words "I say received", put their signatures there in his presence after having received from him a personal acknowledgment of his signature as executant of the mortgage. Mr. Munshi has entirely failed to satisfy me as to this. There is no evidence that the mortgagor made any acknowledgment to these two witnesses at the time they signed the receipt clause that he had previously signed the document as an executant thereof. I can only treat their signatures to the receipt clause as what they purport to be, namely an acknowledgment by them that he admitted the receipt of the money, and that he had signed the document in that place for that purpose. Coming now to Mr. Munshi's contention that there is sufficient attestation to the document to be found from what took place on 21st December 1901, before the Sub-Registrar, although the mortgagor put his signature to the document admitting execution, there is no evidence that he admitted execution in the presence of Sakarlal Jayantilal; and as regards the signature of Sakarlal Jayantilal on the document, that merely indicates that he signed the document after being examined by the Registrar as to the identity of the mortgagor. Whether Sakarlal Jayantilal was present when the mortgagor admitted execution and whether he signed his name on the document in the presence of the mortgagor does not appear. Further there is no evidence to prove whether the Sub-Registrar put his name on the document in the presence of the mortgagor or in the presence of Sakarlal Jayantilal or afterwards. Consequently, even if Mr. Munshi were right in his contention that what takes place before the Sub-Registrar may be used for the purpose of showing that the document afterwards registered was duly attested by two witnesses before registration, he has failed to satisfy me by any evidence on this point. He has submitted that this document being over thirty years old, I ought to presume that these persons were all present and made their signatures at one and the same time in each other's presence. I am not, I

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think, entitled to make any such presumption, and I decline to do so.

Apart from authority, I am of opinion that what takes place before the registering officer has nothing to do with attestation, and cannot be looked at for the purpose of proving attestation of a document which requires to be registered. S. 47, Registration Act of 1908, says that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. This section obviously contemplates that any document presented for registration shall be complete and valid in law before presentation. The duty imposed upon the registering officer by S. 34 is to enquire whether or not the document was executed by the person by whom it purports to have been executed, and to satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document and any enquiry held by the registering officer is directed to these matters and not to attestation. Similarly the endorsements required by S. 58 to be made upon the document are in reference to admission of execution and the identity of the persons admitting execution, and not to attestation. And though the registering officer is bound by S. 59 to affix the date and his signature to all endorsements made in his presence, he is not bound to do so at the time they were made, and will comply with the section if he does so on the same day, at a time when the persons who made the endorsements may not be present. Clearly, therefore, this Section does not contemplate that the signature of the registering officer to any endorsement is to be treated as that of an attesting witness in connexion with an admission of execution. In my opinion the relevant sections of the Indian Registration Act assume that the document which is sought to be registered is a document complete in all essentials before it is presented for registration.

There is a conflict of authority upon the point in other High Courts. A Full Bench of the Madras High Court in 52 Mad 123 (1), has taken the view that the signatures of the registering officer and of the identifying witnesses affixed to the registration endorsement under Ss. 58 and 59, Registration Act, are a sufficient attestation within the meaning of S. 59, T. P. Act, and its subsequent amending Acts. In that case there had been a finding that the Sub-Registrar had made his signature in the registration endorsement referring to the admission of execution by the executants of the document in the presence of the executants, that the witnesses who identified the executants before the Sub-Registrar were present when the admission of execution was made by the executants, and that both the identifying witnesses had made their signatures in the presence of the executants. In the judgment of the Court delivered by Coutts Trotter, C. J., he said (p. 127):

> The argument against this conclusion was that the signatures were made alio intuitu, to satisfy the requirements of the Registration Act, and cannot therefore be invoked in aid for another purpose, viz., attestation under the Transfer of Property Act, though in fact all the conditions laid own by the latter Act are fulfilled. The registering officer and the identifying witnesses had exactly the same duty imposed upon them by the Registration Act as would have rested upon them as attesting witnesses under the Transfer of Property Act, and that duty they discharged.

With respect, I do not agree. It is true that the registering officer has imposed upon him by S. 34, Registration Act, the duty of satisfying himself whether execution was admitted by the person purporting to execute it, but it is no part of his duty to attest the signature of the executant, and the only duty imposed upon the identifying witnesses is to identify the person who has admitted execution. No duty is imposed upon them to attest the signature of that person as executing the document, and they are not called before the Registrar for that purpose. With respect to that decision, I disagree with it. On the other hand, there is a Full Bench decision of the Allahabad High Court in 54 All 1051 (2), which takes the same view as that at which I have arrived in this case, and with that decision I agree. Whether I am right or wrong in the opinion which I have formed, it would not, I think, be proper to force this title upon an unwilling purchaser having regard to the conflict of opinion which

1. Veerappa Chettiar v. Subramania Ayyar, 1929 Mad 1=116 I C 367=52 Mad 123=55 M L J 794 (FB).

2. Lachman Singh v. Surendra Bahadur Singh, 1932 All 527=139 I C 1=54 All 1051=1932 A L J 653 (F B).

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exists between two Full Benches of different High Courts. In 36 Bom L R 1041 (3), Broomfield, J., at p. 1048, said :

> The meaning of a title free from reasonable doubt was explained in 10 Hare 1 (4) as a marketable title which can at all times be forced upon an unwilling purchaser, and it was held in that case that specific performance should not be allowed even though the Court takes a favourable view of the title if it appears that its opinion may fairly and reasonably be questioned by other competent persons.

Having regard to the difference of opinion which exists, I cannot say that the opinion which I have myself expressed might not fairly and reasonably be questioned by other competent persons. In such circumstances, it seems to me that I cannot possibly say that the title here is a title free from reasonable doubt. The opinion which I have arrived at is in itself sufficient to dispose of this matter; but as other points have been argued, I will very briefly deal with them. The mortgagor, on 6th October 1907, executed a second mortgage of the property (Ex. B), and on 21st April 1909, he created a further charge thereon (Ex. C). No re-conveyance in respect of the second mortgage is forthcoming, nor any release in respect of the charge. The mortgagee under the original mortgage in purported exercise of his power of sale sold the property by public auction on 20th November 1910. The property was purchased by one Abdul Mujid Valli Mahomed, and the mortgagee executed a deed of assignment of the property in favour of Abul Mujid Valli Mahomed on 7th November 1911. The mortgagor also executed an assignment on 5th November 1913, in favour of the said Abdul Mujid Valli Mahomed on the last day of the term of the lease, and the present defendants derive their title to the property through the said Abdul Mujid Valli Mahomed. The defendants have contended that by reason of the sale the second mortgage and the charge have been extinguished, and that the second mortgagee and the chargee are estopped from challenging the mortgage and sale, inasmuch as the second mortgage and charge were subject to the first mortgage. Mr. Munshi referred to S. 69, T. P. Act, and contended that there had been a sale made in professed exercise of the power contained in the mortgage as contemplated by sub-s. (3), of S. 69, and that the second mortgagee and chargee by reason of sub-s. (4) would be bound to look to the mortgagee for any moneys due to them under their second mortgage and charge. In my opinion, this contention is entirely unfounded, inasmuch as S. 69 contemplates a sale in professed exercise of a power under a mortgage, which is a valid mortgage, and if, as I hold is the fact in the case before me, there never was a valid mortgage, there could not be a professed exercise of sale under the mortgage. Accordingly in my opinion, the rights of the second mortgagee and chargee are entirely unaffected by the first mortgage and the sale professsed to be made thereunder. As regards estoppel there is no suggestion of any representation having been made, which would give rise to an estoppel, and in my judgment no question of estoppel exists.

The next point taken by the plaintiff arises in connexion with a mortgage of the property on 16th October 1923, in favour, among other persons, of Vithaldas Vasanji, a firm, the partners in that firm at that date being Vasanji Premji and Jeewandas Trikamdas. As the mortgage-moneys under that mortgage were not paid off, an assignment of the equity of redemption was executed by the mortgagors on 8th April 1931, in favour, among other persons, of Vasanji Premji and Jiwandas Tricumdas, as being the partners in the firm of Vithaldas Vasanji. At the date of the said assignment, there were three other partners in that firm in addition to Vasanji Premji and Jiwandas Tricumdas. The purchaser has contended that the said assignment ought to have been made in favour of all the partners in the firm of Vithaldas Vasanji at the time of the assignment. I do not agree. The mortgage was to the firm of Vithaldas Vasanji among other persons. That means in law that it was a mortgage to those persons among others who were partners in the firm at the time, namely, Vasanji Premji and Jiwandas Tricumdas. The equity of redemption has been assigned to those two persons, and in my opinion that is sufficient. Even if that were not the case, Mr. Munshi on behalf of the defendants expressed his willingness that all existing partners in the firm of Vithaldas Vasanji should join in the

3. Lallubhai v. Mohanlal, 1935 Bom 16=155 I C 564=59 Bom 83=36 Bom L R 1041.
4. Pyrke v. Waddingham, (1852) 10 Hare 1.

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conveyance of the property to the purchaser.

The last point taken by the plaintiff also related to the mortgage dated 16th October 1923, which was made in favour of Gordhandas Govindji Bhanji, Ramdas Girdhardas Kuverji and Tulsidas Valji, in addition to the abovementioned firm of Vithaldas Vasanji. The plaintiff says that the defendants have failed to satisfy him that the moneys advanced by the said persons were their self-acquired property and that no other persons were interested in the said moneys as their coparceners. But the equity of redemption has been assigned to those persons and to the partners of the firm of Vithaldas Vasanji, and in my opinion there is no substance in this point. The result is that I answer the question submitted to me in the negative, and hold that the defendants have not made out a marketable title to the property. I order the defendants to pay to the plaintiff the costs, and as this matter is, in my opinion, one of importance, I order the costs to be taxed on the same scale as a long cause under R. 243 (1), High Court Rules.

B.D./R.K. *Order accordingly.*

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BEAUMONT, C. J.

Bai Jivkore Lakshmiram— Applicant

v.

Himatlal Girdharlal Parekh—Opponent.

Civil Revn. No. 33 of 1935, Decided on 10th September 1935, against order of Sm. C. C. Judge, Ahmedabad, in C. S. No. 4065 of 1933.

Provincial Small Cause Courts Act (1887 as amended by Bombay Act 6 of 1930), Sch. 2, Cl. 4, sub-cl. (c)—Suit for ejectment based on tenancy-at-will is triable by Small Cause Court.

A tenancy-at-will is a tenancy so long as both parties are willing to continue it and if one party gives notice of his desire to terminate the lease, the lease determines either by efflux of the time limited thereby, namely the duration of the will of the parties or under Cl. (h), S. 111, T. P. Act, and suit for ejectment of such a tenant does fall within sub-cl. (c), Bombay Act, and is cognizable by a Small Cause Court. [P 98 C 2]

J. C. Shah—for Applicant.
U. L. Shah—for Opponent.

Order.—This is an application in revision against an order of the Judge of the Small Cause Court, Ahmedabad, in which he held that he had no jurisdiction to deal with the suit, on the ground that the lease in suit created a tenancy-at-will. I do not agree with the grounds on which the learned Judge proceeded. The Small Cause Courts Act provides, under the Schedule 2, Cl. (4), that a Small Cause Court has no jurisdiction to try a suit for the possession of immoveable property or for the recovery of an interest in such property. That was amended by Bombay Act 6 of 1930 by inserting after the words "such property" the following words: "but not including a suit for ejectment where. . ." Then there are three sub-clauses specifying the conditions which have to be fulfilled. Conditions (a) and (b) are admittedly fulfilled in this case. Condition (c) is in these terms:

(c) The only substantial issue arising for decision is as to whether the lease has determined by efflux of the time limited thereby or has been determined by a notice in accordance with Cl. (h), S. 111, T. P. Act, 1882.

The learned Small Cause Court Judge held that a tenancy-at-will does not fall within the provisions of sub-cl. (c). That seems to me to be erroneous. A tenancy-at-will is a tenancy so long as both parties are willing to continue it. If one party gives notice of his desire to determine the lease, then, I think that the lease has determined either by efflux of the time limited thereby, namely, the duration of the will of the parties, or under Cl. (h), S. 111, T. P. Act. In the present case the landlord gave a month's notice to determine the lease. Apart from this point, however I am of opinion that looking at the plaint and the defendant's written statement, it cannot be said that the termination of the lease is the only substantial issue to determine, because the defendant disputes the plaintiff's title as claiming through the original landlord, and that is not a matter which can be dealt with in the Small Cause Court. It appears that the plaint was originally presented to the regular Court and was refused, and the plaintiff was directed to present the plaint to the Small Cause Court. I think that that refusal on the part of the regular Court was wrong. The plaintiff must now take his plaint back to the regular Court, and I have no doubt the regular Court will now entertain the matter. The application must be dismissed with costs.

B.D./R.K. *Application dismissed.*

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✲ ✲ A. I. R. 1936 Bombay 99

B. J. WADIA, J.

Lallubhai Chakubhai Jariwala—Plaintiff.

v.

Chimanlal Chunilal and Co.—Defendants.

O. C. J. Suit No. 479 of 1934, Decided on 3rd April 1935.

✲ (a) **Patent — Infringement of — Mixed question of law and fact—Counterfeiting or imitation must be proved— Particulars of breach of patent rights should be stated—Patent can be infringed by taking part of invention— Relative importance of part of invention should be considered.**

The question of infringement of a patent is a mixed question of law and fact. A patent may be infringed in several ways, one of which is by using the invention or any colourable imitation thereof in the manufacture of articles or by putting the invention in practice in any other way. The plaintiff therefore has got to prove that his process has been counterfeited or imitated by the defendants. It is necessary for him to give the particulars of the breaches constituting the alleged infringement of his rights: 1932 *Bom* 128, *Ref.* [P 100 C 2; P 101 C 1]

A patent may sometimes be infringed by taking a part only of the invention, but that depends on whether the part for which protection is asked is a new and material part especially in the case of a combination. If it is not new and material, the Court must consider what is the substance of the invention, and to do so it has to consider the relative importance of all the parts of the invention. [P 114 C 1]

✲ (b) **Patent—Invention, what constitutes —What can be subject-matter of patent—Manufacture—New and useful result of combination gives subject for patent.**

Manufacture comprehends not only the production of an article but also the means or method of producing it, so that a new process or the improvement of an old process can be a manufacture within the meaning of the Act. The word "art" is sometimes used as an equivalent of manufacture. The subject-matter of a patent must be a new manufacture or art, for if there is no new manufacture or art, there is no subject-matter and therefore no invention. A new and useful application of an old principle may be good subject-matter. An improvement on something known may also afford subject-matter ; so also a new combination of different matters already known. A patentable combination is one in which the component elements are so combined as to produce a new result or to arrive at an old result in a better or more expeditious or more economical manner. If the result produced by the combination is either a new article or a better or a cheaper article than before, the combination may afford subject-matter for a patent. A mere collection of two or more things, however, without some exercise of the inventive faculty in combining them is not subject-matter for a patent. In the case of a combination the inventor may have taken a great many things which are common knowledge and acted on a number of principles which are well known. If he has tried to see which of them when combined produce a new and useful result, and if he succeeds in ascertaining that such a result is arrived at by a particular combination, the combination will, generally speaking, afford subject-matter for a patent. [P 104 C 2 ; P 105 C 1]

✲ (c) **Patent—Specification — Importance of claiming clause — Construction of specification is matter of law—How specification should be read—Construction should be impartial and reasonable.**

It is incumbent on the patentee to particularly describe and ascertain the nature of his invention in the specification, as the ambit of his invention is circumscribed by the claims. The construction of a specification is a matter of law and is for the Court. It must be construed as a whole. The claiming clauses are an important part of the specification and they must be fairly construed in reference not only to the specification but also to the title. The proper way to read specification is not to read the claims first and then see what the full description of the invention is, but first to read the description of the invention, in order that the mind may be prepared for what it is that the invention is to be claimed for the patentee cannot claim more than he desires to patent: *Arnold* v. *Bradbury*, (1871) 6 *Ch A* 706, *Ref.* [P 105 C 1, 2]

As far as possible the claims must be so construed as to give an effective meaning to each of them, but the specification and the claims must be looked at and construed together in order to see whether there is a real and substantial difference between the claims, or whether one is practically a repetition of the other. A specification must be construed impartially, and the Court is generally slow to construe it against the patentee. But the construction must not only be a "benevolent" but a reasonable one. [P 105 C 2]

✲✲ (d) **Patent—Novelty and utility are essential for validity—Test laid down—Absence of prior and public user—If user is secret, profits of inventor should not be excessive—Distinction between public and private user — What amounts to publication and what amounts to public user explained—Prior user may be user of experimental or secret nature—But if it exceeds such limit and is carried on for profit, such user will defeat subsequent patent.**

The two features necessary to the validity of a patent are novelty and utility, but the real test is the novelty of the invention. There must be an absence of prior publication or of prior public user, and if the user is secret or experimental, the profits made by the inventor from his invention must not be excessive. There is a distinction under the section between public user and private user only, so also there is a distinction between public user of the invention by working it commercially, and public user of the invention from the point of view of publication. The prior public user of the invention for the purposes of trade may, in certain cases defeat a patent for want of novelty quite apart from the question of publication. If

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the public has once become possessed of the knowledge of the invention or has anticipated it by prior public knowledge before the date of the application, no patent subsequently granted will be valid. As to the sufficiency of the publication it is necessary that the publication of the knowledge must be a publication in British India. It may not be necessary that members of the public should have actually read it. It is enough if the publication is accessible to the public without much trouble, e. g., if the document is to be found in the library of the Government Patent Office in Calcutta, or on the shelves of a public library in any known place in India, or of a library appertaining to an educational or scientific institution and easily accessible. With regard to the sufficiency of the knowledge, the earlier publication must give the requisite knowledge clearly, and it is not enough that it merely gives the means of attaining such knowledge. It must give sufficient information to a workman skilled in the particular art or craft in order to enable him to carry out the invention. How far that knowledge anticipates the new invention is again a question of fact depending on the facts and circumstances of each case. Even where the prior document and the present specification are identical or nearly identical in language, it does not necessarily follow that the Court must conclude that the first is an anticipation of the second, and often expert evidence is necessary to help the Court to consider what knowledge the prior publication could have conveyed to the mind of a person who had not the knowledge given by the invention in dispute.

[P 106 C 2 ; P 107 C 1,2 ; P 108 C 1]

Public user does not mean a user or exercise of the invention by the public, but a user or exercise in a public manner ; and it is in every case a question of fact. If the invention is being put into practice before and at the date of the grant, the grant will not be for a new invention or manufacture, and this applies equally whether the invention is being practised by the patentee himself or by others. A use of the invention for the purposes of trade may constitute a prior user which invalidates the patent; and the prior public sale of goods or articles treated according to the invention is a public user of the invention, for the sale is strong evidence that the user was really commercial and not experimental. In order however for the sale to constitute sufficient evidence of public user it should be open and in the ordinary way of business. The publication of the invention by sale of the articles treated by it for the purposes of trade by the patentee or by others may constitute a prior user even if there is no publication. [P 110 C 2; P 111 C 1]

The prior user may be of an experimental nature, or may be such as if it is genuinely necessary for the inventor to satisfy himself as to the practicability of his invention. If it exceeds such limit and is carried on for profit, such a user will defeat the subsequent patent. But a distinction is drawn between the use of an invention for profit and the carrying out of experiments which turn out successful and only incidentally bring in profit to the inventor.

[P 111 C 1, 2]

✲ (e) Patent—Infringment of— Injunction when should be granted.

In case of an infringement of patent the Court has to see whether what is done takes from the patentee the substance of his invention. The Court will in every case inquire as to what constitutes the essence of the invention as claimed and will hold the defendant to have infringed if he has taken the "pith and marrow" of the invention as "claimed." [P 112 C 1]

M. V. Desai and *H. H. Dalal* — for Plaintiff.

F. J. Coltman, *C. K. Daphtary* and *M. A. Somjee*—for Defendants.

Judgment.—This is a patent action. Plaintiff is the holder of a Patent No. 18164, dated 4th July 1931, for an improved process of treating dried fruits, the process being particularly applicable to the treatment of dried shell almonds and betel-nuts. Defendants are betel-nut merchants, and the plaintiff's case is that since about April-May 1933, defendants have been using his process, or substantially the same process, for the treatment of betel-nuts, and have been selling betel-nuts in the market treated by that process. He filed the suit on 3rd April 1934, alleging that the defendants are infringing his patent rights, and prays for an injunction against the defendants and for an account of the profits made by them, or, in the alternative, for damages in respect of the infringement. Defendants deny the validity of the patent on various grounds, and they also deny the infringement. Several issues have been raised. Plaintiff led his evidence first. He was examined and cross-examined in full detail and his counsel closed his case, reserving his right to call evidence in rebuttal, if necessary. Defendants' counsel thereupon argued that even assuming everything else in the plaintiff's favour, plaintiff had failed to prove any infringement on the evidence led by him, and that the defendants had therefore no case to meet, or, as it is said in England, there was no case to go to the jury. Counsel therefore applied that the plaintiff might be non-suited at this stage and his suit dismissed.

The onus of proving the infringement is undoubtedly on the plaintiff. It has been held that the question of infringement is a mixed question of law and fact. Plaintiff's counsel, in his opening, referred to 34 Bom L R 6 (1), and argued that this case could not be tried piecemeal,

1. Sowkabai v. Sir Tukojirao Holkar, 1932 Bom 128=137 I C 362=56 Bom 224=34 Bom L R 6.

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but in my opinion that case has no application here, because no issue has been tried as a preliminary issue. In fact, the plaintiff has led all his evidence on the issues, the burden of proof of which was upon him, and he has closed his case. In order, however, to determine the position arising at this stage of the trial, it is necessary to consider what the plaintiff has got to prove. This being a suit for infringement of the patent, the plaintiff must, under S. 29, Patents and Designs Act (2 of 1911), prove that during the continuance of the patent acquired by him under the Act in respect of an invention the defendants have made, sold or used the invention without his license or counterfeited it or imitated it. According also to Halsbury, Vol. 22, para 426, at p. 210, a patent may be infringed in several ways, one of which is by using the invention or any colourable imitation thereof in the manufacture of articles or by putting the invention in practice in any other way. The plaintiff, therefore, has got to prove that his process has been counterfeited or imitated by the defendants. It is necessary for him to give the particulars of the breaches constituting the alleged infringement of his patent rights, and he has given those particulars in Ex. B to the plaint. It has been stated in para. 3 of the plaint that the plaintiff craves liberty to give further and better particulars of the breaches, if necessary, after obtaining discovery, but he has not taken any steps to apply for the same, and the particulars he relies on are only those contained in Ex. B to the plaint.

It may be mentioned here that these particulars are not put in proper form as they consist partly of particulars and partly also of comment. But discarding the comment and taking the particulars strictly so called, the plaintiff has alleged that compared to his process the material part of the defendants' process is as described by him in paras. (a) (b) and (c) of Ex. B. The defendants' process of treating betel-nuts is described by them in Ex. 2 to the written statement in all its component parts. Plaintiff in his cross-examination stated that he did not accept the whole of the description of that process in Ex. 2 as correct. It was, therefore, argued by defendants' counsel that on the ground that plaintiff had not accepted the whole of the description of their process, and also on the ground that Ex. 2 had not been tendered by the plaintiff as an admission by the defendants of what their process was, plaintiff had really failed to prove any infringement, because he could not ask the Court to hold that a process which had not been proved as being the defendants' process was a colourable imitation of his own. In my opinion it was not necessary for the plaintiff's counsel to tender Ex. 2 as the defendants' admission. Ex. 2 is annexed to the defendants' written statement, and it is for the Court to consider whether the description of that process is consistent or inconsistent with the infringement complained of by the plaintiff. It would have been otherwise if the plaintiff had said that Ex. 2 was not the defendants' process at all, but that is not the case here. The plaintiff had also in his attorneys' letter before the date of the suit alleged that the defendants were using his patented process, and the defendants by their attorney's reply said that their process was different from, and not an imitation colourable or otherwise of, the plaintiff's process.

What is the evidence as to the alleged infringement on which the defendants ask the Court that the plaintiff should be non-suited at this stage of the trial? When the plaint was filed and the particulars of the breaches were annexed, a correct description of the defendants' process was not before the plaintiff, and he, therefore, stated the details of comparison on information. Plaintiff treats his goods in a solution of bleaching powder and the defendants do the same. He further alleges that after treating the goods with bleaching powder he treats them in a solution of acetic acid, whereas defendants use a solution of muriatic acid, and that muriatic acid is only a chemical substitute for acetic acid. It is lastly stated that after treating the goods in the manner aforesaid both he and the defendants treat the same in sulphur dioxide under pressure. These particulars are annexed to para. 3 of his plaint. Defendants plead to para. 3 in para. 19 of their written statement. They say that the particulars are incorrect, but they do not clearly state how they are incorrect. If the defendants had not annexed a description of their process to their written statement, the plaintiff could not have asked the Court to pass a

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decree in his favour because of the alleged breaches which are stated on information and belief. He could have, however, asked for further inspection in connexion with the defendants' process. But that was obviated by the description of the defendants' process annexed to their written statement. The plaintiff has at the end of his examination-in-chief compared the two processes, and stated what difference there is between the two.

The plaintiff uses a three per cent, solution of bleaching powder ; the defendants use a four and a half per cent. solution. Plaintiff has stated that any variation between three to six per cent. could not make any material difference. Plaintiff was first using hydrochloric acid, from which he changed to acetic acid. Defendants are using muriatic acid, and the plaintiff has stated that acetic acid and muriatic acid have the same chemical effect. On that he has not been cross-examined, and I take it that there is no difference between the two for the washing away of the calcium deposited on the goods. The plaintiff has stated that he treats the goods finally in sulphur dioxide under pressure, and he alleges in Ex. B that according to his information the defendants did the same. Defendants in part 8 of Ex. 2 say that they treat the goods with sulphur fumes in a closed chamber according to the old method of burning sulphur in a "sigree," leaving the goods exposed to the fumes for eight hours and more. It was argued on behalf of the defendants that the plaintiff had not specifically stated that the closed chamber used by the defendants was a pressure-tight chamber as used by him ; but in his examination-in-chief he said that when goods are treated with sulphur fumes in a closed chamber as described in part 8 to Ex. 2, some pressure on the goods would be generated. In his cross-examination on 28th February last he first stated that part 8 to Ex. 2 as described by the defendants indicates that the goods have been subjected to some pressure, but further down he said that if the description of the defendants' process in part 8 to Ex. 2 to the written statement was correct, there would not be pressure. These are inconsistent statements, as they stand. He has, however, after comparing Ex. 2 with his own process, said that the particulars in Ex. B to the plaint contain the whole of his complaint as regards the alleged infringement. It cannot be said that this last statement is on information only, because he has compared the component parts of his process with the component parts of the defendants' process as described in Ex. 2 to the written statement. Plaintiff's description of the comparison between the two may or may not be correct, but the two processes are now before the Court, and it is for the Court to say whether the plaintiff has made out a prima facie case of infringement. In my opinion this is a question which can reasonably be argued, and I cannot hold at this stage that the plaintiff should be non-suited. I wish to make it clear that I am not deciding on the question of infringement one way or the other. I am not holding that the plaintiff has proved the infringement. All that I hold is that there is some evidence of infringement which the defendants must meet. The case must, therefore, proceed further on all the issues, and I order accordingly.

April 3.—I have in my preliminary judgment delivered on 4th March 1935, stated the main points of contention between the parties. The defendants have raised various defences as to the validity of the patent, and these have been crystallised in the different issues raised on their behalf. Before, however, I deal with the contentions of the parties, it is necessary to set out a few introductory facts. Plaintiff is an analytical and consulting chemist. He studied in Germany from 1922 to 1927 and took the degree of Doctor of Science of the University of Frankfort in May 1927. In the beginning of that year he joined one Girdharlal Shah in partnership under the name and style of Jariwala Shah & Co., and after his return from Germany the firm commenced doing business in drugs, cumin seeds, and heavy chemicals. About the end of the year they began importing dried fruits as well. In March-April 1928, the firm started a manufacturing department which was subsequently known as the Jasco Chemical and Allied Industries Company in which they produced liquorice, styrax and other things. The business was carried on in Apollo Street, Fort, where the plaintiff had also a small laboratory. In or about October-November 1929, the firm of Harakhchand Shivji & Co., who are large dealers in dried fruits, approached the plaintiff, and they asked him

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whether he knew the process of bleaching almonds and betel-nuts white, as white almonds and betel-nuts fetched a better price in the market. It was then agreed between them and the plaintiff that plaintiff was to find out a commercially successful process for the purpose, and to use it when found exclusively for Harakhchand Shivji & Co., so long as they paid him at the rate of Rs. 300 per month. Plaintiff thereupon commenced experimenting in his laboratory in order to find out such a process. In or about January or February 1930, Jasco Co. was sold to the defendants, and one Varmani, who was a chemist in the employ of Jariwala Shah & Co., joined the defendants' service. Plaintiff supervised the work of Jasco Co. at Mazagaon for the defendants, without any remuneration, and he also continued exprimenting for the process in his laboratory which was shifted from the Fort to a room near Jasco Co.'s factory at Mazagaon. It was alleged by the defendants' partner Chunilal Nathubhai and by Girdharlal Shah that both Girdharlal and the plaintiff became partners with the defendants after Jasco Co. was sold to the defendants, but this is denied by the plaintiff.

In or about April 1930, Harakhchand Shivji & Co. put up a factory near the factory of Jasco Co. at Mazagaon for the purpose of bleaching almonds and betelnuts as the plaintiff had by that time found out a tentative process. He worked that process in the factory of Harakhchand Shivji & Co. from about April-May till July-August 1930, and they paid him Rs. 300 per month according to his agreement for the months of April, May, June and July 1930. The tentative process, however, did not prove successful, as the almonds turned mouldy after a time and the taste of the kernel was also affected with the result that the factory had to be closed. Plaintiff continued experimenting and found out a suitable process for bleaching almonds in or about November 1930, and for bleaching betel-nuts about February 1931. In or about the month of October 1930, the firm of Jariwala Shah & Co. was dissolved, as disputes arose between the partners, and Girdharlal Shah left off attending the business. In November 1930, the factory of Harakchand Shivji & Co. started working again, and almonds as well as betelnuts were bleached according to the plaintiff's process, and sold by Harakhchand Shivji & Co. in the market. Thereafter the plaintiff applied for a patent for his process on 4th July 1931, and the application was accepted on 27th October 1931. The patent was sealed on 27th April 1932, with effect from the date of the application. From November 1930, when the factory was re-started, Harakhchand Shivji & Co. commenced paying Rs. 300 per month to the plaintiff again according to the original agreement, and the plaintiff received this amount till about October 1931, when he was informed that one Shamaldas Shah, the brother of his former partner Girdharlal, had installed a new plant for bleaching dried fruits according to a process which the plaintiff alleged was an infringement of his. Plaintiff thereupon filed a suit in this Court against Shamaldas, being Suit No. 940 of 1932, in June 1932, for an injunction to restrain him from infringing his patent rights. The suit was heard before Broomfield, J., and was dismissed. The plaintiff thereupon filed an appeal, and the judgment of the Court below was reversed by the appeal Court in March 1934. It granted the injunction and certified the validity of the patent.

The judgment of the appeal Court is reported in 36 Bom L R 881 (2). Defendant in that suit has filed an appeal to the Privy Council, and the appeal is still pending. The present suit was filed on 3rd Aprll 1934. The plaintiff alleges that the process used by the defendants for bleaching betel-nuts is a colourable imitation of his own, and that they are thereby infringing his patent rights. The patent is in respect of a process which has been described in the specification annexed to the grant of the Letters Patent. The specification is headed "Improvements in and relating to the treatment of dried fruits," and it particularly describes and ascertains the nature of the plaintiff's invention and the manner in which the same is to be performed. The invention consists in soaking the dried fruits in a one per cent solution of sulphuric acid for about fifteen minutes, followed by an immersion of the soaked fruit in a three per cent solution of bleaching powder in which it is frequently stirred for about ten minutes, and subsequently in a two per cent solution of acetic acid in which

2. Lallubhai v. Shamaldas, 1934 Bom 407=153 I C 481=36 Bom L R 881.

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it is again stirred for about twenty-five minutes. The fruit is then washed with clean water and subjected to the action of sulphur dioxide fumes or gas in a closed chamber under pressure of 5 lbs. to a square inch for about an hour. The sulphur dioxide fumes are forced into the chamber after being generated in an oven by burning sulphur in it, the oven being located outside the chamber. The chamber is fitted with a chimney in the roof with a valve at the upper outlet. After the fruit is thus subjected to pressure the valve is opened, and the fumes allowed to escape. The fruit is then exposed for about half an hour to hot air blown into the chamber in order to remove the moisture on the fruit. The chamber is then opened, and the fruit removed and placed in the open air for about an hour for being dried before it is filled in bags for the market. At first the sulphur dioxide fumes were injected into the closed chamber by steam, but later on by air. This part of the process is called gasification. The specification also contains a description of the old method which was employed for treating dried fruits with sulphur fumes. The fumes were generated by burning powdered sulphur in "sigrees" or coal stoves put into a chamber, the door of which was closed and made smoke-tight by applying "cowdung" to the joints, the almonds remaining in contact with the sulphur smoke thus generated for about eight hours.

At the foot of the specification is a statement of the plaintiff's claims, as it is provided by S. 4 (3) of the Act that the specification must commence with a title and end with a distinct statement of the invention claimed. There are three claiming clauses at the end of the specification. The first clause describes the process of treating dried fruits by the use of sulphuric acid in solution followed by an immersion in bleaching powder and subsequently in a solution of acetic acid and finally subjecting the goods to the action of sulphur dioxide gas in a closed chamber for about an hour. The second clause mentions the treatment of dried fruits by the chemical solutions referred to in Claim No. 1 "supplemented by treatment with sulphur dioxide and hot air under pressure in a closed chamber substantially as herein described." The words "substantially as herein described" exercise a limiting effect on the claim by tying it more closely to the preceding description in the body of the specification. It may be here noted that the period of treatment inside the closed chamber under the second claiming clause is the same, namely about an hour. The third clause describes the apparatus used after saturation of the goods in the chemical solutions mentioned in Claim No. 1, consisting of a sealed chamber with a chimney and an outlet valve and a sulphur burning oven and injector. The monopoly is thus defined by the claims, and the monopoly is the consideration which the inventor seeks and secures.

The problem before the plaintiff was to find out a commercially successful process for bleaching almonds and betel-nuts white without in any way spoiling the kernel or affecting its taste, and the plaintiff claims that he has found out, and is, therefore, the first and true inventor of, such a process. Is that process, as described in the specification, an invention within the meaning of the Act? The question was answered in the affirmative by the appeal Court in 36 Bom L R 881 (2). That judgment cannot create an estoppel as against the defendants. But the validity of the patent has to be considered anew, as various additional defences have been taken and materials put forward by the defendants which were absent in the earlier suit. S. 2 (8) defines "invention" as meaning "any manner of new manufacture," and includes an improvement and an alleged invention. S. 2 (10) provides that "manufacture" includes any art, process or manner of producing, preparing or making an article, and also any article prepared or produced by manufacture. "Manufacture" therefore comprehends not only the production of an article, but also the means or method of producing it, so that a new process or the improvement of an old process can be a manufacture within the meaning of the Act. The word 'art' is sometimes used as an equivalent of manufacture. The subject-matter of a patent must be a new manufacture or art, for, if there is no new manufacture or art, there is no subject-matter and therefore no invention. The question whether there is an invention is a question of fact in each case. A new and useful application of an old principle may be good subject-matter. An improvement on something known may also

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afford subject-matter; so also a new combination of different matters already known. A patentable combination is one in which the component elements are so combined as to produce a new result or to arrive at an old result in a better or more expeditious or more economical manner. If the result produced by the combination is either a new article or a better or a cheaper article than before, the combination may afford subject-matter for a patent. The mere collocation of two or more things however without some exercise of the inventive faculty in combining them is not subject-matter for a patent. In the case of a combination the inventor may have taken a great many things which are common knowledge and acted on a number of principles which are well known. If he has tried to see which of them, when combined produce a new and useful result, and if he succeeds in ascertaining that such a result is arrived at by a particular combination, the combination will, generally speaking, afford subject-matter for a patent.

The next question for consideration is, whether the plaintiff claims his patent for a new combination made up of its component parts, sometimes called the subordinate integers, or whether the first claim in the specification is a separate invention by itself which has also been patented and therefore entitled to protection. To use the language of the Lord Chancellor in (1877) 2 A C 315 (3), at p. 321, is the first claim "an invention which is a subordinate integer in the larger invention?" It is incumbent on the patentee to particularly describe and ascertain the nature of his invention in the specification, as the ambit of his invention is circumscribed by the claims. The construction of a specification is a matter of law and is for the Court. It must be construed as a whole. The claiming clauses are an important part of the specification and they must be fairly construed in reference not only to the specification, but also to the title. The proper way to read specification is, as was pointed out in (1871) 6 Ch A 706 (4), not to read the claims first and then see what the full description of the invention is, but first to read the description of the invention, in order that the mind may be prepared for what it is, that the invention is to be claimed, for the patentee cannot claim more than he desires to patent. Plaintiff's counsel in his closing address argued that the plaintiff claimed patent not only for the combination, but for the first claim as a separate invention by itself. He did not, however, say so in his opening, and that is not the case made out in the plaint, nor does it appear from the plaintiff's evidence. It has been pointed out by Lord Esher, M. R., in 11 R P C 493 (5), that as far as possible the claims must be so construed as to give an effective meaning to each of them, but the specification and the claims must be looked at and construed together in order to see whether there is a real and substantial difference between the claims, or whether one is practically a repetition of the other. The specification itself describes one invention only in its separate parts, and the manner in which it is to be performed. The invention is not described in a way which upon the ordinary rules of construction makes it clear that the plaintiff as the patentee has had in his mind and intended to claim protection for the subordinate integers also, as being in themselves matters which ought properly to form the subject of a patent of invention: see (1877) 2 A C 315 (3). If that was his intention, he must, as pointed out by the Lord Chief Justice in 25 R P C 393 (6), tell the world so on the face of his specification. A specification must be construed impartially, and the Court is generally slow to construe it against the patentee. But the construction must not only be a 'benevolent', but a reasonable one. On reading the specification and the claims together, I cannot say that the first claim has been clearly put forward as a separate invention by itself. It refers to the treatment of dried fruit by means of the chemical solutions mentioned in it and then subjecting them to the action of sulphur dioxide gas in a closed chamber for about an hour. The second claim refers to the treatment of dried fruit by means of the chemical solutions mentioned in Claim No. 1,

supplemented by treatment with sulphur dioxide and hot air under pressure in a closed chamber substantially as herein described.

3. Clark v. Adie, (1877) 2 A C 315=46 L J Ch 585=36 L T 923.
4. Arnold v. Bradbury, (1871) 6 Ch A 706.
5. Parkinson v. Simon, (1894) 11 R P C 493.
6. Harrison Patents Co. Ld. v. W. N. Nicholson & Sons, Ld., (1908) 25 R P C 393.

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It was argued that the closed chamber contemplated in Claim No. 1 is distinct from the closed chamber contemplated in Claim No. 2, and that the chamber in Claim No. 1, may or may not be pressure-tight, whereas the chamber in Claim No. 2 is such. If that was so, it ought to appear clearly from the specification, but in the specification the plaintiff's invention has been described as consisting in treating dried fruits by means of chemical solutions and then placing the fruit in a closed chamber and treating it under pressure with sulphur dioxide and hot air. That closed chamber is the chamber referred to in Claim No. 2. In my opinion Claim No. 2 is the real Claim and the real object of the plaintiff's patent. This also appears from Claim No. 3 which describes the apparatus for treating dried fruit in a closed chamber which is pressure-tight. In the plaint the plaintiff speaks of one invention only and complains of its infringement by a colourable imitation. The breaches complained of in Ex. B to the plaint are the particulars of the alleged infringement of that process. That infringement is his definite cause of action against the defendants. Having specified it, he is bound to prove it, and it is by that cause of action that he must stand or fall.

Plaintiff refers in para. 3 of the plaint to the "pith and essence" of his process, but he has not described what it is. He has however in his cross-examination stated that the pith and essence of his process is the combination of the use of bleaching powder and sulphur dioxide under pressure, and to make his meaning still more clear he has also stated that his whole process is a bleaching process in two parts, viz., treatment with bleaching powder, and with sulphur dioxide under pressure. Further down in his cross-examination he stated that the merit of his process consisted in reducing the gasification to to one hour, and this shortness of time he attributed to the use of pressure. In my opinion it is not enough to say that each one of the claims is a separate invention by itself because there are three claiming clauses; nor can it be said that the plaintiff has definitely and clearly alleged in the plaint that Claim No. 1 is a separate invention merely because the whole specification is annexed to the plaint. It is also not enough in order to make Claim No. 1 a separate invention, to say that the use of bleaching powder in combination with sulpur dioxide was not known in British India for treating almonds, betelnuts, etc. It is not this combination that is claimed as a new invention and patented, but the combination of bleaching powder and sulphur dioxide under pressure.

The specification was also construed in the earlier suit, 36 Bom L R 881 (2), and both the learned Judges of the appeal Court pointed out that the plaintiff's ingenuity and skill consisted in combining substances more or less previously known in a particular manner and in a particular sequence so as to prepare and produce an article which had not been produced before, and in overcoming the difficulties which existed even after a crude application of some of those substances previously. In arriving at my conclusion I do not rely merely on the judgment of the appeal Court, but upon the specification itself and the claims, and the plaintiff's case as made out, both in the plaint and in his evidence. It was not put to the plaintiff, nor did he suggest in his evidence, that Claim No. 1 was a separate invention by itself. It is the combination that is claimed as an invention, and it is the combination that in my opinion was patented. The two features necessary to the validity of a patent are novelty and utility, but the real test is the novelty of the invention. Novelty is essential, for otherwise there would be no benefit given to the public and consequently no consideration moving from the patentee. The plea of want of subject-matter is included in the plea of want of novelty. Under S. 38 of the Act an invention shall be deemed a new invention (a) if it has not, before the date of the application for a patent thereon, been publicly used in any part of Bristish India or made publicly known in any part of British India, and (b) if the inventor has not by secret or experimental user made direct or indirect profits from his invention in excess of what the Court may deem reasonable in consideration of all the circumstances of the case.

There must therefore be an absence of prior publication or of prior public user; and if the user is secret or experimental, the profits made by the inventor from his invention must not be excessive. These are the points which are covered by

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issues 8 to 11 in the suit. According to the decision of the Appeal Court in 36 Bom L R 881 (2), there is a distinction under the section between public user and private user only, but the appeal Court has not distinguished between public user of the invention by working it commercially and public user of the invention from the point of view of publication. The prior public user of the invention for the purposes of trade may, in certain cases defeat a patent for want of novelty quite apart from the question of publication. It is pointed out by the appeal Court at p. 886 that if the patentee treats the almonds or betel-nuts by his process openly so that anybody can come and see what the proceess is, there will be a public user of the process which will disentitle him from applying for Letters Patent. That is a public user of the invention from the point of view of publication or making it publicly known. There is an issue in this suit as to open manufacture by the plaintiff before the date of his application for the patent in July 1931. Plaintiff was cross-examined, and defendants have led some evidence, about it. It was argued on behalf of the defendants that the plaintiff had made his process publicly known by working it in the presence of persons who were in the position of outsiders qua the process and under no injunction as to secrecy, that the evidence showed that no special precautions were taken by the plaintiff, nor was any watchman engaged for the purpose of keeping persons out, that various persons walked in and out of the factory of Harakhchand Shivji and Co., whenever they wanted, and that even as against Varmani there was an injunction as to secrecy only after December 1930, when the plaintiff went out of Bombay for his marriage, whereas the plaintiff had even before then revealed the process to him. Defendants also rely on a statement made in the affidavit of Premji Khetsey, who was an assistant manager of the factory.

The affidavit was made in the other suit on 27th June 1932, and I held the statement to be relevant as the plaintiff stated that the affidavit was made on his behalf and he had adopted the statements in the affidavit as his own. The particular statement relied on was that it was part of Premji's duty to supervise the bleaching work in the factory under the plaintiff's directions. He has, however, not been called, and I do not attach much value to such a statement. Moreover, it is not clear as to what part of the bleaching work was supervised by him. Neither he nor any of the other workmen in the factory was a chemist. Varmani was a chemist, but he was really helping the plaintiff, and the process was shown to him in confidence, so that he stood in confidential relationship with the inventor. The inventor is entitled to ask his friends confidentially to help him to advise him, provided they are not so many that they may be regarded as a portion of the public. Chunilal Nathubhai, one of the defendant's partners, who was called, said that he used to go almost every day to the factory of Harakhchand Shivji and Co., for a few hours and saw the plaintiff working at his process. He saw the plaintiff throwing in some sort of acid in the vats in which the goods were treated, but he could not say what acid it was, nor had he any idea of the chemical solutions used.

Girdharlal Shah, who was once the plaintiff's partner in Jariwala Shah and Co., and is now in the employ of Chunilal Nathubhai, seemed to me to be a prejudiced witness, and I do not rely on his evidence. I do not believe him when he said that he learnt the whole of the plaintiff's process when he went to see the plaintiff at the factory. In para. 15 of the written statement the defendants alleged that the plaintiff made known and published his process to the persons and employees of Jasco Co., and to the partners and servants of Harakhchand Shivji and Co., before the date of his application for the patent. No one of them has been called, nor has anyone been called to say that he learnt the plaintiff's process by going to or working in the factory of Harakhchand Shivji and Co. The workmen under the plaintiff were ordinary coolies paid from day to day, and none of them has been called to prove that he knew of the plaintiff's method. It is quite a different thing if, as in 6 De G M & G 420 (7), thousands of persons have had the opportunity of seeing a new apparatus at work for a period of four months, in which case there is a clear dedication to the public. Plaintiff, how-

7. Re Adamson's Patent, (1856) 6 De G M and G 420=25 L J Ch 456=4 W R 473.

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ever, stated that the chemical solutions and mixtures were prepared by himself, that he alone knew the weight of the bleaching powder he used for the purpose of the solution, and that no one was allowed to be present during that part of the process known as gasification. The fact that Harakchand Shivji and Co. took steam, water and electric energy from Jasco Co., which was sold to the defendants, is immaterial. There is not, in my opinion, sufficient and cogent evidence to establish that before the application plaintiff had made his process publicly known, nor any reason for doubting the plaintiff's word that secrecy was observed. Nor has it been shown that betel-nuts were treated by other merchants according to the plaintiff's process before the date of the application.

The next point to consider is whether the plaintiff's invention has been anticipated by prior public knowledge, for it is clear that if the public has once become possessed of the knowledge of the invention before the date of the application, no patent subsequently granted will be valid. Has the patentee, therefore, added to the stock of public knowledge, or is what he has done a mere development of pre-existing knowledge relating to the subject-matter of the patent, such as a man skilled in a particular art or craft or trade to which the invention is related might be expected to make? Plaintiff had to perform numerous experiments in order to arrive at the result he has obtained, and if such experiments were necessary for the purpose, the inference in his favour would be strong that such result was not obvious but constitutes a real addition to public knowledge. The inference is, however, rebuttable, for it is possible that in spite of the experiments an inventor may have done nothing more than re-discover what was old. It is, therefore, necessary to consider the state of the prior or pre-existing knowledge on the subject-matter of the patent. Plaintiff has admitted that bleaching powder is a well-known bleaching agent and was used for bleaching jute, hemp and paper pulp, but not for bleaching dried fruits before. He also stated that sulphur dioxide in gaseous form without pressure was also in use for bleaching dried fruits, and it was used under pressure for bleaching woollen and cotton fabrics and paper pulp. A combination of bleaching powder and sulphur dioxide in solution was also in use for bleaching paper pulp. Defendants on the other hand, say that the use of bleaching powder as a bleaching agent in the case of dried fruits was known long prior to the plaintiff's application and so also was the use of bleaching powder in combination with sulphur dioxide, and for that purpose they want to rely on certain earlier publications in documents as a form of anticipation which invalidates the patent subsequently granted. Two questions thereupon arise for consideration in connection with those earlier publications.

Was there in the first place sufficient publication, and did the document or documents so published and relied upon furnish sufficient knowledge? As to the sufficiency of the publication it is necessary that the publication of the knowledge must be within the realm, and so far as we are concerned, it must be a publication in British India. We have got to ascertain whether the public had access to these publications in British India in order to learn the knowledge they contained. It may not be necessary that members of the public should have actually read it. It is enough if the publication is accessible to the public without much trouble, e. g., if the document is to be found in the library of the Government Patent Office in Calcutta, or on the shelves of a public library in any known place in India, or of a library appertaining to an educational or scientific institution and easily accessible. With regard to the sufficiency of the knowledge, the earlier publication must give the requisite knowledge clearly, and it is not enough that it merely gives the means of attaining such knowledge. It must give sufficient information to a workman skilled in the particular art or craft in order to enable him to carry out the invention. How far that knowledge anticipates the new invention is again a question of fact depending on the facts and circumstances of each case. Even where the prior document and the present specification are identical or nearly identical in language, it does not necessarily follow that the Court must conclude that the first is an anticipation of the second, and often expert evidence is necessary to help the Court to consider what knowledge the prior publication could have conveyed to the mind of a person who had not the

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knowledge given by the invention in dispute.

Defendants rely on the publication of a treatment of bleaching nuts, e. g., walnuts and other nuts, which is to be found in the right-hand corner of the second column at p. 946 of a volume of over a thousand pages which was produced by one Robert Peters, the Superintendent of the Patent Office in Calcutta, in his de bene examination, and taken back. It is not certain however whether there was any index to the volume at all. The same treatment is mentioned at p. 79 of Vol. 20 of the Chemical Abstracts for January to May 1926, a bi-monthly American journal. The volume was produced by the Librarian of the Royal Institute of Science, and an extract was put in as Ex. 8-A. He said that the library could be used by a bona fide research student or by anyone interested in science or a scientific publication on obtaining the permission of the Principal of the Institute. The bi-monthly gives the summaries of all new important chemical processes all over the world. This particular treatment consists of immersing the nuts in a solution from which nascent chlorine is liberated, which is the same as using bleaching powder in solution, and then immersing the nuts in a solution of sulphur dioxide. Defendants have also annexed to their written statement an extract from Vol. 25 of the Chemical Abstracts for 10th May to 10th August 1931, for bleaching almonds. This volume was also produced by the same librarian, and the extract put in as Ex. 10. It refers to the Agricultural Gazette of New South Wales, and a copy of part 2 for February 1931, from Vol. 42 of that Gazette was produced by the librarian of the Agricultural College, Poona. The original bound volume is missing from the library, but there is no doubt as to the genuineness of the copy that was produced and of the pages from it that were put in.

This extract shows three methods by which almonds badly stained can be successfully treated. Defendants have also annexed an extract from the Journal of the Textile Institute for 1928 containing the precis of a specification of the English Patent No. 316265. Mr. Peters produced the entire specification in the de bene, and it was put in as Ex. 5. Plaintiff's counsel complained that it had not been alleged that this entire specification was public knowledge, nor whether the Journal of the Textile Institute for 1928 was available to the public. Moreover the treatment is for bleaching jute and hemp, and consists inter alia in using a weak solution of chlorine and sulphur dioxide in solution or "other reducing agent containing sulphur and oxygen." Defendants lastly rely on an extract at p. 3919, Vol. 17 of the Chemical Abstracts for June to October 1923. This was also produced by the Librarian of the Royal Institute of Science and the extract put in as Ex. 9. It deals with the treatment of paper pulp. The defendants called two scientific experts, one Dr. Korde who is a Doctor of Science with a German degree, and one Mr. Bamji who is a research student of chemistry in Bombay. Neither of them has worked out any of these processes which have been annexed to the defendants' written statement, and Dr. Korde admitted that it does not necessarily follow that merely because the use of bleaching powder is successful with jute or hemp it would be equally successful in the treatment of dried fruits, though he said he would make an attempt. It did not also according to him necessarily follow from the successful use of a chemical for one vegetable fibrous matter that the same chemical will be equally successful for another, nor is the effect of sulphur dioxide in solution necessarily the same as that of sulphur dioxide in gaseous form.

The plaintiff called Dr. Kamat who is also a Ph. D. of Berlin in rebuttal, and he impressed me much more favourably by his answers than the expert witnesses called on behalf of the defendants. Dr. Kamat stated that he had performed experiments according to the processes relied on by the defendants and annexed to their written statement except where no working data were given. The samples of goods treated by these processes were produced by him in Court and exhibited, and he said that the results were not at all satisfactory, as the betel-nuts turned brownish after a time. According to him a method applied successfully to almonds may not be equally successful for betel-nuts. In his opinion the processes on which the defendants rely are not workable, and all that they showed was that efforts were made to bleach nuts and almonds, jute, hemp and paper pulp with

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bleaching powder and sulphur dioxide in solution. A competent chemist who had ascertained the state of the existing knowledge from the publications could not have found out the plaintiff's process which was patented. It has been held in 31 L J Ch 457 (8) at p. 468, that whatever is essential to the new invention must be read out of the prior publication. If further information and further discovery are required and difficulties have to be overcome before the desired result is finally arrived at and embodied in a form which would serve the uses of mankind, it cannot be said that the prior publication is an anticipation of the new invention.

In my opinion therefore the defendants cannot rely upon these earlier publications as an anticipation. We have it in evidence that the plaintiff laboured long and almost continuously in his laboratory first in the Fort and then at Mazagaon. He performed sixty-five experiments on almonds and sixteen on betel-nuts, and kept a note of each of them in two note books written in German. The notes were made after completing each particular experiment. An attempt was made to discredit the notes by suggesting that they were subsequently made up for the suit, but there is no foundation for that suggestion. It is true that the note of the last experiment dated 13th November 1930, on 100 lbs. of betel-nuts is not accurate, for the plaintiff said that he started with 100 lbs. and ultimately experimented on 6 lbs. only, filling three bags with betel-nuts weighing 2 lbs, each. He said that there may be other small inaccuracies in his notes, but taking them as a whole their accuracy has not been seriously challenged. The experiments are spread over a year and show how the plaintiff varied the treatment from time to time and ultimately arrived at his final process, in November 1930, with regard to almonds, and by the end of February 1931, with regard to betel-nuts. In my opinion it cannot be said that his process is a mere adaptation of known materials to uses analogous to those which have been applied before, involving no ingenuity, and therefore not capable of being the subject-matter of a patent. There was sufficient invention in the combination, and the combination has not been anticipated by prior publication.

Hills v. Evans, (1862) 31 L J Ch 457=4 De G F & J 288=8 Jur N S 525=6 L T 90.

The next question is, whether the plaintiff's invention has been anticipated by prior public user. Has it been publicly used by the plaintiff and / or by others before the date of the application? Public user does not mean a user or exercise of the invention by the public, but a user or exercise in a public manner; and it is in every case a question of fact. If the invention is being put into practice before and at the date of the grant, the grant will not be for a new invention or manufacture, and this applies equally whether the invention is being practised by the patentee himself or by others. A use of the invention for the purposes of trade may constitute a prior user which invalidates the patent, and it has been held that the prior public sale of goods or articles treated according to the invention is a public user of the invention, for the sale is strong evidence that the user was really commercial and not experimental. In order however for the sale to constitute sufficient evidence of public user it should be open and in the ordinary way of business.

Counsel argued that there was a prior public user by reason of the plaintiff allowing the firm of Harakhchand Shivji & Co. to put goods treated by his process on the market for sale as a part of their business. No record of these sales is forthcoming, and no one has been called by the plaintiff from Harakchand Shivji & Co.; but plaintiff stated in his evidence that his process was used for that firm in the ordinary course of their business, and he believes it is being used even now. The firm bleached on an average ten tons of almonds per month after November 1930 and about one and a half tons of betel-nuts per month from March 1931, which increased to four and a half tons per month from and after May 1931. Plaintiff also said that he bleached as much as he was required to do, and he would have bleached even more, but did not, as Harakhchand Shivji & Co. were awaiting the results of the sales in the market. It was pointed out by the appeal Court in the same judgment to which I have referred before that in numerous cases a sale of articles treated by the plaintiff's new process in open market might amount to a public user of the process, because the article might be of such a character that the secret of its manu-

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facture could easily be ascertained and its sale would involve a disclosure of that secret and thus amount to a public user of the process. That is however only a way of making the process publicly known, for a publication may take various forms, but the publication of the invention by sale of the articles treated by it for the purposes of trade by the patentee or by others may constitute a prior user even if there is no publication. In 23 R P C 79 (9) rough and incomplete samples or specimens of tin-plate boxes were used to obtain orders from intending customers, and though the method of the manufacture was not apparent from the samples, and there was therefore no publication, it was still held that there was a prior public user before the date of the patent. That is the English law, and, with due respect, I do not agree with the appeal Court that on this point there is a difference between the law in England and S. 38 of our Act. But as that is the view of the appeal Court, I am bound to follow it ; and I must, therefore, hold that the sales of the betel-nuts in public did not amount to a public user of the invention on account of the nature of the article treated by it. I may point out that in the earlier suit which went up to the appeal Court there was no evidence of the quantities of almonds that were treated by the plaintiff's process and then sold in the market, but according to the view of the appeal Court the quantity of the goods sold may be immaterial, as the secret of the process cannot be detected, whatever may be the quantity of the goods sold.

There still remains the second part of S. 38 which deals with secret or experimental user. I have already held that there was no prior public user, and that the user by the plaintiff was not made known publicly and openly to the outside public, so that it might have formed an addition to the stock of public knowledge. The only person who really came to know of it was Varmani, and it was communicated to him in confidence. The user was therefore secret. The next point for consideration is whether the prior user was under the circumstances, of an experimental nature, or was it more than what was genuinely necessary for the inventor to satisfy himself as to the practicability of his invention ? If it exceeds such limit and is carried on for profit, such a user will defeat the subsequent patent. But a distinction is drawn between the use of an invention for profit and the carrying out of experiments which turn out successful and only incidentally bring in profit to the inventor. It is not strictly correct to speak of "experimental user for profit", but only to consider whether the inventor has made any profit incidental to the experimental user. In my opinion, the user was experimental, and I believe the plaintiff when he said that he was still awaiting the results of the sales in the market before treating even larger quantities by his process. Defendants' counsel, however, contended that it was not necessary for the purposes of an experimental user to enter into an agreement under which the plaintiff was to receive Rs. 300 per month so long as he continued to work his process for Harakhchand Shivji & Co., and as this amount was the maximum profit which the plaintiff could get out of his process, it must, under the circumstances of the case, be deemed to be excessive. There is no test nor any authority which lays down the limit beyond which the profits made by the inventor out of his invention are deemed excessive. It is the inventor's profit alone that has to be considered. Having bound himself down to Rs. 300 per month irrespective of any profits that would be made by Harakhchand Shivij & Co., so that he could not get more under any circumstances, I cannot say that the amount of Rs. 300 per month received by him from March till July 1931, when he applied for the patent, is really excessive. The patent had sixteen years to run and the only payment made to the plaintiff was for those few months only. In the result I hold that the plaintiff's invention is a new invention within S. 38 of the Act.

There is evidence about a demand by the public for dried fruits treated by it, and I accept that evidence. The invention is also practically useful for the purposes indicated by the inventor at the date when the patent was granted, and thus fulfils the test of utility also. The patent is, therefore, valid, and its validity has already been certified by the appeal Court in the other suit.

9. Hudson, Scott & Sons, Ld. v. Barringer, Wallis and Manners Ltd., (1905) 23 R P C 79.

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A point made against the plaintiff was that the title of the specification "Improvements in and relating to the treatment of dried fruits" is false and misleading on the ground that the claim is too wide, the process not being applicable to all kinds of dried fruits, e. g. dried figs and dates, nor to fruits with hard shells which have cracks or openings. That, however, is not a material defect as the plaintiff has stated that he has not claimed that his process applies to each and every kind of dried fruits, but only to almonds, betel-nuts, ginger and fruit with hard shells, which require bleaching. Moreover, it has not been shown by the defendants that the process is not suitable for those dried fruits which have been particularly mentioned in the specification. This brings me to the real and crucial question in the suit, namely the issue of infringement. The onus is on the plaintiff, and it is for him to show that the two processes, namely, his own and that of the defendants, are substantially the same. It has been said that it is seldom that the infringer does the thing, the whole thing, and nothing but the thing described in the specification. Slight variations here and there may be immaterial; the Court has to see whether what is done takes from the patentee the substance of his invention. According to Terrel on Patents, Edn. 8, p. 152:

> It may be stated as a general proposition that the Court will in every case inquire as to what constitutes the essence of the invention as claimed, and will hold the defendant to have infringed if he has taken the "pith and marrow" of the invention as claimed.

We have it from the mouth of the plaintiff himself that the pith and essence of his process is the combination of the use of bleaching powder and sulphur dioxide under pressure, and in order to show the infringement he must prove that the defendants have pirated the substance of his invention. Taking the two processes together, one finds that the defendants do not use sulphuric acid in solution but a hot solution of washing soda instead; the effect of both is to clean or remove the dirt from the goods, though according to the defendants washing soda helps to extract a red liquid from the betel-nuts which contains tannin and gives a whitish colour to the nuts. The defendants use a four and a half per cent solution of bleaching powder as against the three per cent solution of the plaintiff; this difference is not material according to the plaintiff, and I accept that. Plaintiff uses acetic acid while the defendants use muriatic acid, but the two acids serve the same purpose, namely, removing the calcium deposit on the goods. Both the plaintiff and the defendants use sulphur dioxide fumes or sulphur dioxide in gaseous form. The plaintiff admittedly uses the same under pressure, and the only question is whether there is any pressure created in the process which is followed by the defendants. Pressure is an essential part of the plaintiff's process; its absence from the defendants' process would constitute a material difference between the two. To use the plaintiff's own words:

> If defendants have used any combination of bleaching powder and sulphur dioxide, but not under pressure, I have no complaint against them.

The chamber used for carrying out the plaintiff's process has been described by him in his specification as one built entirely in cement concrete and coated on the inner side with lead sheets, with a lead coated door used to close the chamber and keep it air and gas tight. The sulphur fumes are generated from an oven located near but outside the chamber and forced into the chamber through a lead pipe. According to the old process described in the specification the chamber used had a single door which was "closed and made smoke-tight by applying cow-dung to the joints", and the goods were kept for about eight hours in contact with the sulphur fumes generated by sprinkling powdered sulphur on the lighted coal in the "sigrees" or coal stoves kept in the chamber. The last part of the process followed by the defendants consists of

> treatment with sulphur fumes in a closed chamber according to the old method of burning sulphur in a 'sigree' and leaving the goods exposed to the fumes for eight hours and more.

The door of the defendants' chamber is also, according to the old method, covered with cow-dung after the goods are put in, and the important question is whether in such a chamber pressure is really generated and held. The plaintiff has alleged in the particulars of breaches annexed to his plaint that the defendants treat the goods with sulphur dioxide under pressure, and his counsel contended that that allegation was not denied by the defendants either specifically or even by neces-

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sary implication in the written statement. The defendants have however denied that they began to use or were using the plaintiff's process or substantially the same process for the treatment of betel-nuts or for dried fruits, and they also say that the particulars annexed to the plaint are incorrect. Taking these statements and reading the written statement as a whole, I do not agree with the plaintiff's counsel that the defendants must be deemed to have admitted that they use pressure in their process. On the face of it the defendants' process as described in Ex. 2 to the written statement does not suggest that any pressure is used. The plaintiff himself was not consistent in his answers on this point. In his examination-in-chief he said that when goods were treated with sulphur fumes in a closed chamber, some pressure on the goods would be generated, but in his cross-examination he said that the old process of burning sulphur in 'sigree' and gasifying the goods in a chamber covered with 'cow-dung' was not gasifying under pressure as no special precaution was taken to make the chamber perfectly air-tight.

The door of the chamber used by the defendants is also, as I have said before, covered with 'cow-dung,' and all that the plaintiff could suggest was that he thought that the defendant's chamber was pressure-tight, which means that he was not sure but that it was his belief. It is admitted that he has not seen the chamber used by the defendants, nor has he made any test or experiment according to the defendants' process with 'sigrees' in any chamber similar to the chamber used by them, that is a chamber the door of which is covered with 'cow-dung'. Defendants' counsel suggested before the commencement of his closing address that the Court might call in the aid of an assessor under S. 35 of the Act and if necessary get him to make an experiment to find out whether any pressure is in fact created in the defendants' chamber according to their process, but the plaintiff's counsel did not agree to the suggestion, and said that he would rely on the pleadings and the evidence in the suit.

I have stated before that two expert witnesses were examined on behalf of the defendants, Dr. Korde and Nariman Bamji. Dr. Korde visited the defendants' factory three or four times between June and August 1934, in order to supervise certain experiments performed on almonds and betel-nuts by the defendants' witness Hansraj Valji under his supervision. The experiments were performed according to the defendants' process, and also according to the plaintiff's process minus the pressure. The experiments were, therefore, practically useless for the purposes of comparison, as pressure is admittedly an essential part of the plaintiff's process. The most important of all the experiments was the last one in which Dr. Korde assisted by Mr. Bamji tried to asc rtain whether any pressure was exercised on the goods treated according to the defendants' process when put in the chamber used by them. I do not believe these two witnesses when they said that they did not know nor that they were not told beforehand that the difference between the two processes was that pressure was used by the plaintiff, and that the defendants alleged that it was not used by them. But I have no doubt that the experiment was performed, and that Bamji brought a 'U' shaped manometer made by himself for the purposes of enabling Dr. Korde to gauge the pressure. Dr. Korde made rough notes in his diary, but the diary is not forthcoming now as it has been lost, and the notes he made from the diary last September in order to help him in giving his evidence when the suit was about to be called on for hearing at the time are neither complete nor accurate, being meant only for his own use in Court. After the first two or three experiment Dr. Korde expected that there would be pressure in the chamber after the 'sigrees' were lighted on account of the rise in the temperature. Mr. Bamji said that he was almost sure that there would be none. Both, however, were agreed that in fact no pressure was registered by the manometer. The reason according to Dr.Korde was that either the door of the chamber was a "mis-fit," that is, it was not pressure-tight, or because the goods put in the chamber were moist and the fumes were dissolved in the moisture, or for both these reasons.

According to his theory the sulphur fumes, when they come in contact with the moisture on the goods, form sulphur dioxide in solution or sulphurous acid. which really acts as the bleaching agent Mr. Bamji said that pressure could only

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be generated if the door of the chamber was an iron door and rubber-lined. In my opinion, the experiment was not conducted as satisfactorily as it should have been. Whilst speaking from memory, Dr. Korde did not seem to be quite accurate about the details he deposed to, and his assistant Bamji did not carry the matter any further. But it was for the plaintiff to prove that pressure was used in the defendants' process and not for the defendants to prove the negative. Dr. Kamat who was examined in rebuttal on behalf of the plaintiff stated in answer to the Court that pressure would be generated in a chamber like the one used by the defendants if it was 'leakage-free,' that is, if it was pressure-tight ; but there is no evidence that the defendants' chamber was in fact pressure-tight beyond what the plaintiff thought or possibly conjectured. It was also argued on behalf of the defendants that if there was any pressure generated in the kind of chamber used according to the old method, or used by them, the use of pressure by the plaintiff for a shorter period of time than under the old process would not be a new invention. I am, however, not satisfied on the evidence that the use of pressure is an essential part of the defendants' process. Moreover, it is necessary that pressure should not only be generated in the defendants' chamber, but held, and there is no proof that, even if it was temporarily generated, it was held and that it reacted on the goods in the same way as it reacted in the plaintiff's process. In any event, the evidence on the point leaves the matter in considerable doubt, and the onus of proving the issue as to infringement being upon the plaintiff, I cannot hold that it has been discharged. There is no evidence in this case that anyone communicated the plaintiff s process to the defendants, nor has anyone been called on his behalf to show that the defendants process is in all its essential features identical with that of the plaintiff.

A patent may sometimes be infringed by taking a part only of the invention, but that depends on whether the part for which protection is asked is a new and material part, especially in the case of a combination. If it is not new and material, the Court must consider what is the substance of the invention, and to do so it has to consider the relative importance of all the parts of the invention. The essential part or the substance of the plaintiff's invention is, in his own words, the use of pressure, and therefore there could be no infringement unless the use of pressure by the defendants in their process was proved. There is one other point to which I would briefly refer in conclusion. It may be arguable in the event of its being held that Claim No. 1 in the specification is a separate invention by itself, whether the defendants have committed an infringement of the same. According to them, if Claim No. 1 is an invention, the patent will be defeated for want of novelty on the ground that the process followed by the firm of Cooverji Raghavji & Co., before the date of the plaintiff s application is an anticipation of the invention. But I do not wish to deal with this question at length. The Court has in each case to consider whether or not the infringement comes within the fair meaning of the claims. I have already held that the plaintiff's rights are according to his specification, in the whole combination for which alone he has made a claim, that is a combination of bleaching powder and sulphur dioxide under pressure, and a patent for a combination is not infringed by taking separately the integers comprised in it. The use of pressure by the defendants in their process has not been satisfactorily proved, and therefore is no infringement of the combination. In the result the suit will be dismissed, but I make no order as to costs.

B.D./R.K. *Suit dismissed.*

** A. I. R. 1936 Bombay 114

B. J. WADIA, J.

Union Benefit Guarantee Co., Ltd.—Plaintiffs.

v.

Thakorlal P. Thakor and *others*—Defendants.

O. C. J. Suit No. 1827 of 1931, Decided on 21st January 1935.

**** (a) Defamation - Libel—Defamation of company— What must be proved—Defamatory words presumed to be false— Malice in sense of corrupt motive is not esssential for action of defamation—Court should understand words as other mankind—Words defamatory in secondary sense— Plaintiff must prove innuendo—Meaning of words used and not intention that should be seen.**

In order to succeed in an action for libel a company must establish (a), that the words

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complained of are defamatory in the way of its business, (b) that they were published by the defendants, and (c) that they refer to the plaintiff company. The words "falsely and maliciously" appear invariably in pleadings in defamation suits. All defamatory words are presumed to be false, and it is for the defendants to prove that they are true. But malice in the sense of a corrupt or wrong motive is not an essential ingredient of the cause of action. The liability for defamation arises not from a malicious intention to defame but from the publication of the defamatory words. It is not, therefore, for the plaintiff to prove malice, except when the defendant pleads and proves privilege or fair and bona fide comment on a matter of public interest. Malice may also be material in the assessment of damages. The words complained of may be defamatory in their ordinary sense, and must prima facie be understood by the Court in the same sense as the rest of mankind would ordinarily understand them. They may also be defamatory in a secondary sense in which case the plaintiffs have to allege and prove what is called an innuendo, that is, the plaintiffs have to show that the words, not defamatory in their ordinary meaning or without a special application, are used with a specific libellous meaning. The burden is on the plaintiff to show that the meaning they have assigned to the words is the true meaning, if it is traversed by the defendants. The plaintiff must also prove that the words complained of might reasonably be understood by the persons to whom they were published to refer to the company, and that in fact they were understood to refer to it. If the words have in fact injured the company in the way of its business, it is no defence to say that they were not meant to be defamatory, for the question really is "not what the writer of an alleged libel means, but what is the meaning of the words he has used". It is also no defence for the defendants to say that they did not intend to refer to the plaintiff company as the question is not so much 'who was meant as who was hit.' The plaintiffs have to satisfy the Court on both these points. The evidence must be such as to satisfy the Court that the words will convey that particular defamatory meaning to reasonable men, and it is not enough to say that the words were understood by some persons in that definite sense or were understood to refer to the plaintiff. Nor can the plaintiffs prove the innuendo by simply asking their witnesses what they understood by the words complained of, unless they have laid a basis or established a foundation by letting in evidence of facts and circumstances to show that words which bear their ordinary meaning have a libellous tendency. Words are not deemed capable of a particular meaning merely because it might by possibility be attached to them there must be something in either the context or the circumstances that would suggest the alleged meaning to a reasonable mind: *Capital and Counties Bank* v. *Henty*, (1882) 7 *A C* 741; *E Hulton and Co.* v *Jones*, (1910) *A C* 20; *Daines* v. *Hartley*, (1848) 3 *Ex.* 200 and *Simmons* v. *Mitchell* (1880) 6 *A C* 156, *Ref.* [P 120 C 1, 2]

✻ **(b) Defamation—Plea of fair and bona fide comment—Comment of true facts of public interest—Limits of fair comment—What are matters of public interest—Prospectus of company is matter of public interest — Management of company is also matter of public interest—Standard of fair criticism—Honest comment is not necessarily fair—Comment should be bona fide and free from malicious motive—To say of promoters of company as "set of adventurers" is defamatory.**

The essence of the plea of fair and bona fide comment is that it should be, in the first place comment on facts truly stated on a matter of public interest. In other words, given facts which are true as regards a matter of public interest, it is open to any member of the public at large to comment on them fairly, but if any allegation of fact imputing any act or acts of misconduct is made in the course of the comment, the libel is out of the sphere of fair comment, and can be justified only on the ground that the allegation is true. The defence is only applicable to expressions of opinion as distinct from assertions of fact. The onus is on the defendants to show that the matter commented upon is a matter of public interest, that the statements of fact relating thereto are true, and that the comments based on the facts are fair and bona fide. It is then for the plaintiffs to show that the words exceed the limits of fair comment, and are not the real expression of the defendants' opinion, or that the words are inspired by malice. It is usual for the defendant in a libel action to set up what is called the "rolled-up" plea, namely, to state in defence that in so far as the words consist of allegations of fact they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are in the nature of a fair and bona fide comment on a matter of public interest It has been held that this composite plea is really a plea of fair comment only. There is no exact definition of what a matter of public interest is. Matters of public interest are very numerous and are usually grouped under certain heads. A matter of public interest can generally be said to be a matter or subject which invites public attention or is open to public discussion or criticism. The prospectus of a company is a matter of public interest, and there is no reason why the management of its business according to the prospectus which invites the public to deal with the company should be considered as a matter merely for the prospective share-holders of the company, and not a matter of public interest There is no definite standard of fair criticism, but every latitude is given to opinion and even to prejudice. It is, however, necessary that the comment should be on facts which are true, and not on fiction For if the facts do not exist, the foundation of the plea is gone. The important requirement is that the comment must be fair, that is to say, it must be relevant to the subject-matter commented upon and honest in the expression of the writer's real opinion though mere honesty of purpose would be of no avail if the words exceeded the proper limits. The fact that a comment is honest does not necessarily make it fair, though the fairness of the comment often depends upon the language used. Small errors as to details which are immaterial should, however, be overlooked. The comment must also be bona fide,

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and not made from any malicious motive. Malice destroys the defence though it is for the plaintiffs to prove it. [P 123 C 2; P 124 C 1]

Ordinarily, persons who start a company, especially small companies, are in fact also the persons who carry on its management, and to call the promoters of a company, "a set of adventurers" would prejudically affect the company in the way of its business from its very inception. So it is neither a fair nor a bona fide comment to say of a company that it is started by a set of adventurers. The words exceed the limits, and are defamatory of the company in the way of its business. It is really not fair to say that those responsible for floating the company who presumably will be the persons who in the eyes of reasonable men will carry on the business are men who are out for their own personal aggrandisement at the expense of the public, and especially the poorer classes of the public: *Sutherland* v. *Stopes*, 1925 *A C* 47 and *Merivale* v. *Carson*, (1887) 20 *Q B D* 275, *Ref.* [P 122 C 2; P 124 C 2]

(c) Defamation—Limit of fair comment—To say of trading insurance concern that it will not survive to discharge its obligation—It is imputation in way of business and is defamatory.

To say of an insurance trading concern, however small, that it takes upon itself certain obligations on receiving people's money for effecting policies, and will not be in existence long enough to be able to perform those obligations does cast an imputation in the way of its business which on the face of it is defamatory. It is not enough for the defendants to say that the words are merely an inference as to the future based on what had happened in the past, though that inference is supported by the opinion of a well-known actuary. A statement of this nature does overstep the limits of fair and bona fide comment, as it imputes to a going concern a future insolvency by reason of which its business in the present will be prejudically affected. [P 125 C 1]

(d) Defamation—Recommendation to boycott—Not defamatory per se unless special damage is proved.

A mere recommendation to boycott is not defamatory per se. It is actionable, if the plaintiffs can show that they have sustained special or actual damage and it has been held that general loss of business is sufficient "special damage" in such cases. [P 127 C 2]

(e) Principal and agent — Ratification — Knowledge of fact to be ratified and intention essential.

In order that there may be a valid ratification there must be not only a knowledge of the fact to be ratified, but also an intention to ratify, and that the principal must do something more than merely stand by and let his agent act in the way he chooses. Non-intervention by itself is not ratification. [P 128 C 2]

R S. Billimoria and *P. A. Mahale*—for Plaintiff.

C. K. Daphtary, *M. C. Setalvad* and *N.H. Bhagvati*—for Defendants 1-4 and 6-10.

Judgment. — This is a libel action. Plaintiffs are a private limited company doing provident insurance business, and have filed this suit to recover from the defendants the sum of Rs. 50,000 for damages for injury to its credit and reputation and in the way of its business by reason of certain statements which according to them, were falsely and maliciously written and published or caused to be written and published by the defendants, and which the plaintiffs say are defamatory of them. Defendants are all residents of Ahmedabad, and in or about June 1931, they formed themselves into a committee, called the Provident Society Vigilance Committee, in order to make a report to another committee, called the Working Committee of the Indian National Congress, on the working of provident societies and of what are called "Free Insurance Companies" in the Bombay Presidency. The committee has also been described as the Free Insurance Vigilance Committee. All the defendants except defendant 5 appeared at the hearing. Defendant 5 is dead, and his name has been struck off. The words complained of by the plaintiff company appear in the report made and published by the defendants, secondly, in a resolution passed by the defendants' committee, which I will refer to as "the boycott resolution," recommending that certain "Free Insurance Companies", including the plaintiff company, should be boycotted by the public, and thirdly, in the heading of a publication in the "Gujarati", a Gujarati weekly of Bombay, giving the purport of that resolution.

The publication of the report and of "the boycott resolution," at first in Ahmedabad, and subsequently in Bombay, is not denied, but defendants deny that the words were written and published or caused to be written and published by them falsely and maliciously as alleged of and concerning the plaintiff company. They also deny that they gave the heading to the publication in the "Gujarati" which the plaintiff company has complained of. Defendants further contend that even if the words complained of were written and published of and concerning the plaintiff company, they are true in substance and in fact, in so far as they consist of allegations of fact, and are fair and bona fide comment on a matter of

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public interest in so far as they contain expressions of opinion. Defendants deny liability for the damages claimed. In order to appreciate the points in dispute between the parties it is necessary to set out a few facts relating to the plaintiff company and the defendants, and also to refer to the correspondence which led up to the suit. The plaintiff company is a private limited company within the meaning of S. 2 (13), Companies Act of 1913, and was registered on 16th October 1930. It was also registered on 6th November 1930, as a Provident Insurance Society under the Provident Insurance Societies Act of 1912. A Provident Insurance Society is defined in S. 2 (8) of the Act. Under S. 3 the maximum amount payable on a life assurance policy by a Provident Insurance Society is Rs. 500, and the maximum amount of premiums it can receive on any one life policy is Rs. 250. The Act recognises societies or companies working on what is called the "dividing principle."

Under S. 24 of the Act the Local Government is empowered to make rules to carry out the purposes of the Act. Such rules have been framed by the Bombay Government and are called the Bombay Provident Insurance Societies Rules. R. 2 (d) defines a "dividing society business" as a provident insurance business under which the amount payable on the policy money becoming due is not fixed, but depends either partly or wholly on the results of the division of any portion of the premium income or funds amongst the policies which have become due for payment in proportion to the premiums received under each class in any specified period. These societies have been referred to in the evidence as dividing societies or dividing companies or companies or societies working on the dividing principle. Ordinary life assurance business is defined in R. 2 (f) as business transacted on similar lines to those adopted by ordinary life assurance companies. The plaintiff company does both ordinary life assurance business, though on a small scale, and also the dividing society business. The issued capital of the company is Rs. 20,000 in 1,000 shares of Rs. 20 each. The paid up capital amounts to about Rs. 14,000. In all, 925 shares have been subscribed by a few share-holders, out of which Asbai, the wife of Lakhamsi Jetha, one of the directors, holds 851. She became qualified as a director on purchasing 451 shares at first, but it was said that she subsequently resigned. Among the original directors were Lakhamsi Jetha, Haridas Vallabhdas, Jamnadas Mavji, one Lalji Shamji or L. S. Patel, and Shivji Velji. Of these, Haridas Vallabhdas and Jamnadas Mavji resigned on 21st July 1931, and one Gangji Ghela Shanghavi joined the directorate in or about September, 1933. Lalji Shamji is Asbai's brother and Shivji Velji is the son-in-law of Lakhamsi Jetha and Asbai. The managing agents of the company are Bhavanji Brothers of which firm the partners are said to be Shivji Velji and the two minor sons of Lakhamsi Jetha, namely, Virchand and Bhavanji, through their mother and natural guardian Asbai. Under their agreement with the plaintiff company the managing agents were to get Rs. 200 per month by way of remuneration, of which Rs. 50 were payable to Shivji Velji, and Rs. 150 to Asbai on behalf of the minor sons.

It appears that the plaintiff company is really a one-man company, run principally by Lakhamsi Jetha with the help of his wife's moneys and assisted by his son-in-law Shivji Velji. Lakhamsi Jetha was not called as a witness. Shivji Velji was called, and he said that Lakhamsi had thirty years' experience of insurance business, and that he had ten years' experience as an insurance canvasser, but no further details were mentioned. The prospectus of the company is contained in a booklet called "the guide"; it contains rules and regulations, some of which are not very happily worded. The objects of the company are very wide, and have been comprehensively stated in the memorandum of association; some of those objects are reproduced in the prospectus, one of them being to establish a dividing society business. There are five tables at the end of the prospectus. Of these, tables *A*, *B* and *C* relate to ordinary life assurance business, and tables *D* and *E* relate to the dividing society business. The age at admission under table *D*, with which table the Court is principally concerned in this suit, is between 18 and 45. There is a uniform rate of premium for persons of both sexes and of every age between 18 and 45. An applicant is not called upon to undergo a formal medical examination before being insured; he

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has only to make certain declarations referred to in the rules. The payment of benefits and reliefs to the claimants is to be made after deducting out of the monthly premiums thirty per cent. for the expenses of the company, a minimum of fifteen per cent. to form a reserve fund, and not more than ten per cent. for the company's general fund. The registered office of the company was at first at Tamarind Lane, Fort, and was subsequently removed to Kazi Sayad Street. It was registered about the end of 1930, and commenced doing its business some time in January 1931.

The defendants' committee consisted of eleven members, of whom one, as I have already stated before, is dead, and two subsequently resigned. Defendant 11 was the secretary of the committee, and he was the only defendant who was called as a witness. He said that he heard in Ahmedabad in or about May, 1931, about societies or companies working on the dividing principle, and that about forty of them were in existence in Gujarat including Kathiawad and Cutch. Their customers were drawn mostly from peasants and from the poor and illiterate classes of people. He said he read lectures and articles on the subject. In or about May 1931, he saw Mr. Vallabhbhai Patel, who was the then President of the working Committee of the Indian National Congress, and had conversation with him. As a result of the conversation the defendants formed themselves into a committee on or about 10th June 1931, to report on the working of such companies existing in the Bombay Presidency. Defendants sent for the prospectuses of such companies and obtained some. They also consulted some leading actuaries, and issued a sort of questionnaire to which they received replies from about twenty companies. On the materials then before them a report was drafted in English on or about 4th July 1931, and settled at a committee meeting.

Defendant 11 said that at the time when the report was drafted defendants were not aware of the existence of the plaintiff company. The plaintff company, however, was evidently aware of the existence of the defendants' committee, and the managing agents of the plaintiff company wrote a letter on 30th June 1931 to defendant 11, as the secretary of the committee. They sent along with it two copies of the prospectus, and drew the attention of defendant 11 to the tables appearing at the end. The letter reached Ahmedabad the next day, but defendant 11 said that he was busy preparing the report, and that his assistant opened the letter, but did not place it before him till a out July 8. In the meantime the report was circulated among actuaries and public men interested in insurance business all over India for their opinions, and was published in Ahmedabad about 21st July. On 23rd July it was placed before the defendants' committee in order that they might consider what further steps should be taken by them, and the committee resolved that the names of thirty-six companies should be recommended for being boycotted by the public generally. The resolution was formally passed by the defendants on 29th July. It stated that the defendants agreed with the message of Mr. Vallabhbhai Patel to the public that the companies working on the dividing principle deserved "to perish", recommended that those thity-six companies, including the plaintiff company, should be boycotted, and requested the office-bearers and others connected with them to sever their connection. In the meantime, a Gujarati "rendering" or translation of the report was published on 26th July, and appeared in the "Praja-Bandhu", a newspaper published in Ahmedabad. On 1st August certain additions were made to the English report containing the opinion of Mr. M. K. Gandhi as expressed in a journal called "Young India" dated 31st July 1931, under the heading "Mushroom Companies", and the opinion of Mr Vallabhbhai Patel under the heading "Peasants Beware.!' The "boycott resolution" was published in the "Praja-Bandhu" at Ahmedabad on 9th August. It was published in the "Hindustan and Praja Mitra" newspaper in Bombay on 11th August and the report was published in the "Bombay Samachar" on 12th August 1931.

Correspondence ensued between the plaintiff company through its managing agents and defendant 11 as the secretary of the defendants' committee. On 22nd July 1931 the plaintiff company wrote to defendant 11 asking him to read their life insurance scheme, and to let the company know if the defendants wanted any further explanation or information. On 26th July

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defendant 11 replied, stating that he had noted with satisfaction some of the distinguishing features of the plaintiff company, but he added that the company worked on an unsound principle known as the dividing principle, and advised the plaintiffs to consult an experienced actuary on the point. The plaintiff company thereafter wrote several letters in August asking why the defendants considered that principle unsound. At first the defendants sent no reply, but on 14th August defendant 11 replied to the letters, and referred the plaintiff company to the report and the opinion printed at the end of it, and advised the company to scrap the dividing principle altogether. In the meantime the "boycott resolution" was published in Bombay on 11th August, as I have said before, and on the same day the plaintiff company wrote by registered post to the defendants saying that the resolution was defamatory of them as their name was included in the list of companies recommended for being boycotted, and that the resolution made it difficult, if not impossible, for them to secure customers. They asked the defendants for an apology, and in default threatened action. A reminder was sent on 15th August and defendant 11 replied enclosing a copy of the Gujarati report and referring the company again to the opinions of the actuaries embodied in the report and the opinions printed at the end of the report. The defendants refused to apologize. On 31st August defendant 2 wrote to the plaintiffs that the defendants' committee had acted bona fide in the interest of the insuring public. Thereafter the suit was filed on 29th September 1931.

The plaintiffs' cause of action is based on the report published by the defendants' committee, on "the boycott resolution," and the heading of a publication in the issue of the "Gujarati" of 16th August 1931, and it is alleged in para. 13 of the plaint that by reason of these libels which the plaintiff company complains of, it has been injured in its credit and reputation and in the way of its business, and has suffered great loss and damage. The plaintiff company claims Rs. 50,000 in lump as general damages, which means such damage as the law presumes to be a necessary consequence of the defamation, and is distinguished from special damage, or to put it more accurately, actual damage, which is not presumed, but has to be alleged and proved. It has been held that in the case of a company or a trading corporation the words complained of are not actionable without proof of special damage, if they refer only to the personal character or reputation of its officers; but words calculated to reflect upon a corporation in the way of its property or trade or business, and which are calculated to injure it therein, may be actionable without proof of special damage. It was pointed out by Lord Esher, M.R., in (1894) 1 Q B 133 (1) at p. 139 that it was impossible to lay down an exhaustive rule as to what would be a libel of a firm or a company, but it has been generally held that a corporation has a trading character which may be destroyed by libel. For instance it was held in that case that it was defamatory to say of a colliery company that the cottages let by its proprietors to their colliers and workmen were in an insanitary condition, for such an imputation was likely to injure its reputation in the way of its business. If it is alleged that a trading company is insolvent or will be insolvent in the future, or consists of alien enemies in its constitution or management in a time of war, it is entitled to sue. It can also sue if it is alleged to be in the practice of holding out false hopes to the public or entering into contracts which are absolutely insecure: 10 Bing 260 (2). In 4 H & N 87 (3) at p. 90 Pollock, C. B., suggested that the right of action of a corporation to sue for libel was limited to a publication which affected its property but it has now been held that there is no such limitation. The question for consideration is whether the words complained of are in disparagement of its corporate property, or its business or its reputation. In the words of Lord Blackburn in (1882) 7 A C 741 (4) at p. 777 an action will lie if the statement is published without lawful justification or

1. South Hetton Coal Co. v. North-Eastern News Association, (1894) 1 Q B 133=63 L J Q B 293=69 L T 844=42 W R 322=58 J P 196.
2. Williams v. Beaumont, (1833) 10 Bing 260=3 M & S 705=3 L J C P 31.
3. Metropolitan Saloon Omnibus Co. v. Hawkins, (1859) 4 H & N 87 = 28 L J Ex 201 = 7 W R 265=5 Jur N S 226.
4. Capital and Counties Bank v. Henty, (1882) 7 A C 741=52 L J Q B 232=47 J P 214=31 W R 157.

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excuse and is calculated to convey to those to whom it was published an imputation on the plaintiffs injurious to them in their trade or holding them up to hatred, contempt or ridicule.

In order therefore to succeed in this action the plaintiff company must establish (a) that the words complained of are defamatory in the way of its business, (b) that they were published by the defendants, and (c) that they refer to the plaintiff company. As I have said before, the publication has not been denied. The allegation however is that the words were falsely and maliciously published, and this is denied by the defendants. The words "falsely and maliciously" appear invariably in pleadings in defamation suits. All defamatory words are presumed to be false, and it is for the defendants to prove that they are true. But malice in the sense of a corrupt or wrong motive is not an essential ingredient of the cause of action; it is not the gist of the action. The liability for defamation arises not from a malicious intention to defame but from the publication of the defamatory words. It is not therefore for the plaintiff to prove malice, except when the defendant pleads and proves privilege or fair and bona fide comment on a matter of public interest. Malice may also be material in the assessment of damages. The words complained of may be defamatory in their ordinary sense, and must prima facie be understood by the Court in the same sense as the rest of mankind would ordinarily understand them. They may also be defamatory in a secondary sense in which case the plaintiffs have to allege and prove what is called an innuendo, that is, the plaintiffs must show that the words, not defamatory in their ordinary meaning or without a special application, are used with a specified libellous meaning. The burden is on the plaintiff to show that the meaning they have assigned to the words is the true meaning, if it is traversed by the defendants. The plaintiff company must also prove that the words complained of might reasonably be understood by the persons to whom they were published to refer to the company, and that in fact they were understood to refer to it. If the words have in fact injured the company in the way of its business, it is no defence to say that they were not meant to be defamatory, for the question really is "not what the writer of an alleged libel means, but what is the meaning of the words he has used": (1882) 7 A C 741 (4). It is also no defence for the defendants to say that they did not intend to refer to the plaintiff company; as Lord Loreburn, L. C., suggested during the argument in (1910) A C 20 (5), the question is not so much who was meant as who was hit. In England it is for the Judge on reading the innuendo and after hearing the evidence upon it to say whether the words are reasonably capable of being understood in the particular meaning ascribed to them. To do that he has to take into account not merely the words complained of, but the manner and occasion of the publication, the persons to whom they were published, and all other facts which are properly in evidence as affecting the meaning of the words in the circumstances of the particular case. It is then for the jury to say whether the words in fact bore that meaning. In India the plaintiffs have to satisfy the Court on both these points. The evidence must be such as to satisfy the Court that the words will convey that particular defamatory meaning to reasonable men, and it is not enough to say that the words were understood by some persons in that definite sense or were understood to refer to the plaintiffs. Nor can the plaintiffs prove the innuendo by simply asking their witnesses what they understood by the words complained of, unless they have laid a basis or established a foundation by letting in evidence of facts and circumstances to show that words which bear their ordinary English meaning have a libellous tendency: 3 Ex 200 (6), at pp. 205 and 206. This case was cited with approval in (1880) 6 A C 156 (7), at p. 163. The rule has been thus put by Pollock in his Law of Torts, Edn. 13, p. 260:

> Words are not deemed capable of a particular meaning merely because it might by possibility be attached to them: there must be something in either the context or the circumstances that would suggest the alleged meaning to a reasonable mind.

5. E. Hulton & Co v. Jones, (1910) A C 20 = 79 L J K B 198 = 26 T L R 128 = 54 S J 116 = 101 L T 831.
6. Daines v. Hartley, (1848) 3 Ex 200 = 18 L J Ex 81.
7. Simmons v. Mitchell, (1880) 6 A C 156 = 50 L J P C 11 = 45 J P 237 = 29 W R 401 = 43 L T 710.

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I will now deal with the alleged libels in the order mentioned in the plaint. The report is headed :

Report on the Free Insurance Companies and Provident Societies working in the Bombay Presidency.

The names of the members of the defendants' committee appear at the top, and the report is signed by defendant 1, as the president of the committee. The term "Free Insurance Company" is a misnomer. It seems to imply that the company effects policies on lives without charging any premium to the policy-holders, and defendant 11 stated that several companies working on the dividing principle had in their prospectuses described themselves as such. They are really not "free" in the literal sense of the word, and defendant 11 said that he therefore used to put the Gujarati word for "Free" always in inverted commas. The report is in general terms about companies working on the dividing principle, forty of which were said to have been working in Gujarat alone during the year before the publication of the report, the total number for the whole of India exceeding one hundred. It refers to two such companies in particular as illustrations of the general remarks. It ends by requesting the Working Committee of the Indian National Congress to declare unequivocally that such companies are not life insurance companies, but are unscientific, unsound and unworkable, and should not be supported by the public until they have remodelled their insurance schemes. The reasons for this request are then set out one after the other. The plaintiff company has not been referred to therein eo nomine. The plaintiffs however say that the report was meant and understood to refer to the company, as it is included in the list of the companies which were recommended in "the boycott resolution" following the report. Even apart from the resolution, the companies working on the dividing principle are a determinate class which can be ascertained, and therefore the plaintiffs are entitled to sue the defendants by proving that the words complained of refer to the plaintiff company and are defamatory of it in the way of its business. The plaintiff company relies particularly on the passages referred to in para. 4 of the plaint as containing the innuendoes which they have set out in paras. 5 to 8 of the plaint. The first passage is set out in para. 4 (a) in which the defendants state that about twenty-five years back from the date of the report about 1,200 companies working on the dividing principle were in existence in India, that out of these, 1,100 were obliged to close their doors within 10 years, and the adventurers who floated such companies succeeded in filling their pockets at the cost of the ignorant poor. Then come the real words that are complained of:

It is exactly after a generation that a new set of adventurers has again sprung up and started these societies working on the 'Dividing Principle' under the misleading name of 'Free Insurance Companies'.

The plaintiffs say that these words were understood to mean that the plaintiff company was started and was carried on by adventurers who filled their pockets at the cost of the ignorant poor. What is the evidence on which the plaintiff company asks the Court to hold that those words in that passage bore the meaning they allege and in reference to the company? It appears from the Indian Life Insurance Year Book for 1921-1922, published by the authority of the Government of India, that sixteen years before that year there were about 1,200 societies in existence in India of the provident insurance type, that only twenty-nine out of these societies remained of which seventeen were either working on the dividing plan without any minimum guarantee or on "the death call system" and were consequently not susceptible of actuarial valuation. It is however in evidence that the defendants wanted to act on the report, and followed it up by "the boycott resolution", and though the report and the resolution were published at Ahmedabad on different dates, they were published in Bombay in Gujrati on two consecutive days, the resolution appearing in the "Hindustan & Praja Mitra" on 11th August and the report in the "Bombay Samachar" of 12th August 1931. The publication in Bombay has not been denied by the defendants. It was suggested that both the report and the resolution were published by them at the instance of the Working Committee of the Indian National Congress which is said to have been a powerful and influential body in 1931. The witnesses called by the plaintiff stated that they had heard of the Committee, that the Congress was

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behind the Committee, and that they were themselves "congressmen" who were ready to follow its resolutions.

The resolution in question recommends the boycott of certain companies, including the plaintiff company, which follow and work upon the dividing principle, and the report attacks the principle and the companies that follow it. It was argued that the resolution should be considered separately from the report, and that the plaintiffs could not read the resolution into the report in order to construe the report. It is true that they do not constitute one libel. They are separate, but they were published almost simultaneously in Bombay, and read one after the other in Bombay, and it might well be argued by the plaintiff company that it was likely that men of ordinary sense on reading them would be prejudiced against the plaintiff company and would have nothing to do with it in the way of its business. The resolution was published in Bombay before the report, and in my opinion the publication of the resolution is one of the surrounding circumstances which go to show how the words in the report were capable of being understood by men of ordinary sense or ordinary reasonable men, meaning men who have the knowledge, intelligence, experience and even the prejudices of the average man in the class of people to whom the words were meant to be published. Defendant 11 in his evidence said that the passage referred to free insurance companies, and that the plaintiff company was not a free insurance company. But this is mere quibbling, because he admitted that the report refers to free insurance companies working on the dividing principle, and he has called the plaintiff company one of such companies.

The question therefore is whether the inference suggested by the innuendo is an inference which reasonable persons will draw. The passage refers to the adventurers of the past who had started similar companies and filled their pockets at the cost of the ignorant poor, and it goes on to say that in the present such companies were again started by "a new set of adventurers." The word "adventurers" is used in the English report; the word used in the Gujrati report is "talembaj," which primarily means an athlete, but it also means a vagabond. The Gujarati report however is, according to the defendants' own admission, a rendering or translation of the English report, and the word which they have themselves selected in the report which was first published in English is "adventurers." Now an adventurer is described in the dictionaries as one who is on the look out for chances of personal advancement, and this may be by methods which are not always straight. The defendants say of the past adventurers that they had succeeded in filling their pockets at the expense of the poor, and the suggestion is that the new set of adventurers are also men of that type. Moreover, it has been stated in "the boycott resolution" that all possible help should be rendered to the poor to get back their moneys paid by them into companies working on the dividing principle, and the plaintiff company is one of them. It was argued on behalf of the defendants that the words refer only to those who floated or started the companies, i. e., the promoters of the companies, and that the words do not affect the company in the way of its business, because an alleged libel on promoters is not necessarily a libel on the company in the way of its business. Ordinarily, persons who start a company, especially small companies, are in fact also the persons who carry on its management, and to call the promoters of a company like the plaintiff company "a set of adventurers" would prejudicially affect the company in the way of its business from its very inception. As I have said before, the test is what the words used will mean to an average reasonable man, and I think it will be conceded that such a person will not be able to distinguish strictly between the promoters of a company and its managers. Defendants' counsel argued that it had been proved in fact that the promoters of the plaintiff company were adventurers.

In the first place there is no plea of justification, nor is there any sufficient evidence to show who the promoters were and how they were in fact adventurers, except that the first subscribers to the memorandum of the company were not men who had large experience in business. In my opinion, therefore, the words are fairly capable of sustaining the innuendo, and according to the evidence of the plaintiffs' witnesses they were so understood by them. I was particularly

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impressed by the evidence of Jethabhai Nagda, one of the founders of the Bombay Insurance Brokers Association. It must be said that a certain amount of paraphrasing by the witnesses of the passages referred to in the plaint as containing the innuendoes was inevitable. But the witness Jethabhai Nagda clearly stated that the report did not consist merely of advice to the insuring public, but contained allegations that reflected upon the founders and managers of the company. Dr. Vora, another respectable witness, went even further. He said he had been asked to be a director of the plaintiff company, that he read the report only and not the resolution, and on reading the report he thought that he would have nothing to do with the plaintiff company, and he refused to become one of its directors. It is no defence to say that the defendants were not aware of the existence of the plaintiff company at the date of the drafting of the report. If in fact they were in existence, and the words in the passage refer to them, they would a have grievance under the law. In any event, the defendants became aware of the existence of the plaintiff company within a week after the report was drafted and certainly long before its publication.

It was argued on behalf of the defendants that the words complained of in this passage are really not defamatory of the plaintiff company, but are only a fair and bona fide comment on a matter of public interest. If the words are such comment, they are not actionable. Plaintiffs' counsel argued that the defendants cannot put forward the alternative plea of fair and bona fide comment after first pleading that the words were not published of and concerning the plaintiff company, for the defence of fair and bona fide comment in effect admits that the words were published of and concerning the plaintiff company. In my opinion, however, it is open to the defendants to raise this alternative plea, for all kinds of inconsistent pleas can generally be taken up by a defendant. They cannot plead the defence of fair and bona fide comment only, and then seek to show that the words were not published of and concerning the plaintiff company. It was pointed out in 15 Bom L R 130 (8) that it is of the essence of the plea of fair and bona fide comment (p. 169)

> that it should be, in the first place, comment on facts truly stated on a matter of public interest. In other words, given facts which are true as regards a matter of public interest, it is open to any member of the public at large to comment on them fairly, but if any allegation of fact imputing any act or acts of misconduct is made in the course of the comment, the libel is out of the sphere of fair comment, and can be justified only on the ground that the allegation is true.

The defence is only applicable to expressions of opinion as distinct from assertions of fact. The onus is on the defendants to show that the matter commented upon is a matter of public interest, that the statements of fact relating thereto are true, and that the comments based on the facts are fair and bona fide. It is then for the plaintiffs to show that the words exceed the limits of fair comment, and are not the real expression of the defendants' opinion, or that the words are inspired by malice. In England it is for the Court to decide whether the matter commented upon is one of public interest and whether there is evidence that any part of the words complained of exceed the limits of fair comment. If the Court is of opinion that there is evidence that any part of the words complained of go beyond the limits, it is for the jury to find whether that is so or not. Now it is usual for the defendant in a libel action to set up what is called the "rolled-up" plea as the defendants have done in this case, namely, to state in defence that in so far as the words consist of allegations of fact they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are in the nature of a fair and bona fide comment on a matter of public interest. It has been held that this composite plea is really a plea of fair comment only: see (1925) A C 47 (9). In the first place, can it be said that the subject-matter of the words complained of is a matter of public interest? There is no exact definition of what a matter of public interest is. Matters of public interest are very numerous and are usually grouped under certain heads.

A matter of public interest can generally be said to be a matter or subject which invites public attention or is open

8. Nadirshaw H Sukhia v. Pirojshaw R. Ratnagar, (1913) 15 Bom L R 130 =19 I C 98.

9. Sutherland v. Stopes, (1925) A C 47=94 L J K B 166=69 S J 138=132 L T 550

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to public discussion or criticism. It has been held that the prospectus of a company is a matter of public interest, and I see no reason why the management of its business according to the prospectus which invites the public to deal with the company should be considered as a matter merely for the prospective share-holders of the company, and not a matter of public interest. It is a scheme or project placed before the public, and in my opinion the conduct of a private business, if it is of a sufficiently large extent or concerns a sufficiently large number of persons, is a matter of public interest. There is no definite standard of fair criticism, as was pointed out in 20 Q B D 275 (10), but every latitude is given to opinion and even to prejudice. It is however necessary that the comment should be on facts which are true, and not on fiction. For if the facts do not exist, the foundation of the plea is gone. Plaintiffs' counsel argued that there were many misstatements of fact in the report; for instance, it is said in the report that no company working on the dividing principle in the past has ever survived twelve years, whereas in fact it appears from the Indian Insurance Year Book for 1932 that there were some such companies which had survived more than twelve years. This does appear to be a misstatement of fact, and a comment based upon it in reference to the plaintiff company cannot be said to be fair, but I do not think that a long and general report can be said to be entirely vitiated by reason of a single misstatement.

The important requirement is that the comment must be fair, that is to say, it must be relevant to the subject-matter commented upon and honest in the expression of the writer's real opinion, though mere honesty of purpose would be of no avail if the words exceeded the proper limits. The fact that a comment is honest does not necessarily make it fair. But an exaggerated or strong or prejudiced comment is not necessarily unfair, though the fairness of the comment often depends upon the language used. Small errors as to details which are immaterial should however be overlooked. The comment must also be bona fide, and not made from any malicious motive. Malice destroys the defence, though it is for the plaintiffs to prove it. In my opinion, it is neither a fair nor a bona fide comment to say of a company that it is started by a set of adventurers. The words exceed the limits, and are defamatory of the plaintiff company in the way of its business. It is really not fair to say that those responsible for floating a company who presumably will be the persons who in the eyes of reasonable men will carry on the business are men who are out for their own personal aggrandisement at the expense of the public, and especially the poorer classes of the public. The next passage in the report complained of by the plaintiffs runs as follows :

> As no such company working on the Dividing Plan has ever survived twelve years. the question of the fulfilment of the guarantee has never arisen and is never likely to arise in future.

Plaintiffs say that these words were understood to mean that the plaintiff company would not last for twelve years, and that it professed to guarantee the performance of certain obligations, well knowing that it would not exist long enough to be called upon to fulfil such guarantee The first question is whether the words complained of are fairly capable of sustaining the innuendo. Defendant 11 in his evidence stated that he read the names of some of the companies working on the dividing principle in the Indian Assurance Year Book for 1918. This Year Book is published for every year under the authority of the Government of India in the month of July of the succeeding year. It is a yearly publication which has been relied on in this case by either side. Defendant 11 has further stated that he did not find the same names in the Year Book of 1929, and that was the reason of the statement in the report which is the subject-matter of dispute. This may show the defendants' bona fides, as it cannot be said that a statement of this nature is based merely on imagination, but it will still be no defence if the words can be fairly capable of conveying the alleged meaning. The words do not appear to be sufficient to reasonably convey the imputation that the plaintiff company professes to fulfil a guarantee, "well knowing" that in fact it would not. Further it was argued that a statement as to what might happen in the future was not necessarily an imputation on the plaintiff company in its operations at present.

At the same time I am of opinion that to say of a trading concern, however

10. Merivale v. Carson, (1887) 20 Q B D 275=36 W R 231=52 J P 261=58 L T 331.

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small, that it takes upon itself certain obligations on receiving people's moneys for effecting policies, and will not be in existence long enough to be able to perform those obligations, does cast an imputation in the way of its business which on the face of it is defamatory. It is not enough for the defendants to say that the words are merely an inference as to the future based on what had happened in the past, though that inference is supported by the opinion of a well-known actuary, Mr. Vaidyanathan, who gave reasons based on his calculations why a company working on the dividing principle will not ultimately be able to fulfil its obligations. A statement of this nature does overstep the limits of fair and bona fide comment, as it imputes to a going concern a future insolvency by reason of which its business in the present will be prejudicially affected. The plaintiffs have called certain evidence which shows that the words were in fact understood in this meaning by some of the witnesses, but one of them, Ratansi Damji Khona, said in his cross-examination that he did not even understand what a guarantee meant though he first attempted to give his explanation in his examination-in-chief. The defendants could have called evidence on their behalf to show that persons had read the words complained of in this as well as in the other passages, but did not understand them to bear the meaning alleged in the innuendo nor to refer to the plaintiff company. They have chosen not to do so.

The next two passages in the report set out in paras. 4 (c) and 4 (d) of the plaint can be considered together. The words complained of are to the effect that companies working on dividing principle are unactuarial, and therefore unscientific, unsound and unworkable, and would come to grief unless they resorted to unfair tactics and unfair methods such as disqualifying claims received, encouraging lapses of policies and in other ways raising difficulties in the way of persons keeping up their policies. The plaintiffs say that these words were understood to mean that if the plaintiff company continued to flourish, it can only do so because it resorts to the unfair tactics and methods which I have mentioned before. In my opinion the words complained of are incapable of bearing that meaning, nor are they defamatory in their natural and ordinary meaning. That such companies are unactuarial and therefore unscientific, unsound and unworkable is a matter of opinion which may be right or wrong. The Provident Insurance Societies Act does recognise divided insurance business, that is insurance business on the dividing principle, but the opinion that it is unactuarial and unscientific is supported by expert actuaries, including the Government Actuary, and one of them, Mr. Vaidyanathan, was called to explain why these companies could be called unactuarial and unscientific. He has given his reasons at full length. He was called as a witness in order to show that the defendants had made bona fide inquiries before launching their attack upon such companies, and that their criticism was based on a knowledge of the subject supplied to them by a well-known actuary among others.

In my opinion the words cannot and do not mean that the plaintiff company will continue to flourish because it actually resorts or has in fact resorted to unfair tactics and methods. By a mere innuendo you cannot give a new sense to words which they do not naturally bear. There can be no question of the plaintiff company continuing to flourish, because it had just started and hardly begun its business. The words reasonably mean that if such companies after they had been started tried to flourish, they could only do so if they adopted unfair tactics and methods. They do not mean that such companies including the plaintiff company will adopt such tactics and methods in the future in order to flourish or that they have done so in the past. The plaintiffs' witnesses themselves said that they understood that such companies would not flourish unless they were dishonestly worked, but they need not necessarily be so worked. The plaintiffs might at any time determine rather to close their doors than to continue by such methods, assuming that such methods were necessary. Shivji Velji who is a director of the plaintiff company stated that he understood the words to mean that if they worked honestly they would have to close their doors, which does not mean that they would necessarily work dishonestly in order to keep the doors open. These words are therefore not defamatory of the plaintiff company, and

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the opinion that such companies are unactuarial and therefore unscientific is a fair and bona fide comment upon a matter of public interest.

The next passage in the report which the plaintiff company complains of is set out in para. 4 (e) of the plaint. There it is stated that a large number of managing agents of such companies were adventurers who knew how to make money by voting themselves fat salaries and commission and were making fantastic promises of large returns in a short time, and were practically robbing the poor classes of the public of their hard-earned moneys. It is further stated that most of them are insurance canvassers who had suddenly raised themselves to the status of managing directors and that it was discovered that some of them had "a shady past." Plaintiffs say that defendants meant by all these words and were understood to mean that the plaintiff company was run by a sort of managing agents and directors who were not fit to be such, and who had a shady past. There is in this passage no doubt a strong imputation on a large number of the managing agents and directors who are called adventurers who had robbed the poor, and the question arises whether it may be applied to the plaintiff company.

You cannot by an innuendo stretch the natural meaning of the words, but it is open by the innuendo for the plaintiffs to point out and to prove to whom it applies. Counsel for the plaintiffs relied on 11 H L C 637 (11), in which the words were that "some of the Irish factories" had practised cruelties on their workmen, and it was proved that the plaintiffs' factory was thereby meant. Though the plaintiffs were not described by name in that case, it was known who they were, and satisfactory evidence was led to show that they were meant and hit. Are the words complained of, therefore, predicable with reasonable certainty of the plaintiff company? Do the words reasonably mean that the managing agents of the plaintiff company were adventurers or had a shady past? The words are capable of a defamatory meaning. Moreover, the report has to be read as a whole, and reading this passage in connection with the passage set out in para. 4 (a) of the plaint and "the boycott resolution," the words can be reasonably said to apply to the plaintiff company. A reference to the large number of managing agents of such companies also as "adventurers" makes it clear that the authors of the report are making no distinction between those who started the companies and those who managed or would manage the business. It is true that one of the witnesses, Ratansi Damji Khona, said that he did not even know who the managing agents of the plaintiff company were, and he could not therefore, say whether they were the adventurers who were meant, or whether they were the persons who had a shady past, but the other witnesses seem to have understood who was meant. As the words are capable of a defamatory meaning, and were understood to apply to the plaintiff company, the question of fair and bona fide comment does not arise, because such a comment would take the words outside the region of libel. In my opinion, therefore, the plaintiffs have succeeded in proving this innuendo too. The last statement which the plaintiffs complain of as defamatory per se is that the companies working on the dividing principle are "a curse to Indian insurance enterprise." These words are, in my opinion, a very strong expression of opinion, but they do not exceed the limits of fair and bona fide comment on a matter of public interest. The expression itself is borrowed from the introductory statement in the Government Life Assurance Year Book for 1918, though that fact in itself can afford no defence if the words are defamatory.

I will now deal with what has been called "the boycott resolution." It is set out in extenso in para. 10 of the plaint. The defendants have answered para. 10 by denying that the resolution was written or published or caused to be published falsely or maliciously as alleged by the plaintiffs. That is really not a defence. Their defence seems to be, as gathered from the general answer to para. 13 of the plaint, that the words are a fair and bona fide comment on a matter of public interest. It is stated in that resolution that it was unanimously resolved that the defendants' committee agreed with the opinion of Mr. Vallabhai Patel in connexion with free insurance companies that they should "perish," that is to say, they should be abolished, or, as the resolution recorded

11. Le Fanu v. Malcomson, (1848) 11 H L C 637.

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in the minute book of the defendants shows, taken into liquidation, as early as possible. The committee next earnestly appeals to the directors, legal advisers and auditors, and all office-bearers of such companies to sever their connexion with them, and enjoins that all assistance should be given to the poor to recover their moneys which they have already paid in. The committee earnestly recommends the public generally to boycott thirty-six free insurance companies which are doing business on the dividing principle. A list of such companies is given, and the plaintiff company is the tenth in the list.

The first question is whether a recommendation to the public to boycott a trading concern, that is to have no business intercourse with it, is defamatory per se of the trading concern in the way of its business. It has been held that it is actionable to put a man's name on a "black list" with the object of inducing people not to have business dealings with him or with the object of bringing him into public odium or contempt: see 11 T L R 228 (12). In that case an injunction was granted restraining any further publication of the "black list" complained of on the ground that its publication was a purely malicious act unnecessary for the protection of the defendants or the men whom they represented, and was actuated by ill-will and intended to injure the plaintiffs. The decision of Kekewich, J., was confirmed. though not without hesitation, by the Court of appeal; the judgment of the appeal Court is reported in the same volume at p. 280. In (1921) 3 K B 40 (13), the defendants who were a trade union published a list called a "a stop list" in order to enforce compliance with their decisions. The plaintiffs who were dealers in motor cars but were not members of the defendants' association advertised on behalf of a customer a motor car which was being manufactured by a member of the defendants' association at a price exceeding the limit fixed by the association. The plaintiffs' name was thereupon put in the "stop list." It was held that in the absence of any evidence that the words would be understood in a meaning other than in their ordinary meaning, the plaintiffs were not entitled to succeed. Is putting the name of a trading corporation or company in a list of companies recommended for being boycotted an instrument of coercion? In the last case Scrutton, L. J., was of opinion that the very word 'boycotting' was a "question-begging epithet."

The word by itself might at times contain an element of what may be called forcible persuasion, but that would depend on the circumstances of the case. In this case the committee recommended to the public to boycott the different companies including the plaintiff company; they have not made any threats of coercion to third persons if they deal with the plaintiffs. There is no evidence that the defendants had conspired to injure the plaintiffs in pursuit of any malicious purpose. There is no evidence that any one of them was actuated by spite or ill-will or with a desire to injure the plaintiff company. Nor was there, as I have already stated, any threat or intimidation or coercion held out to anyone to follow the resolution. In fact the plaintiffs witness Jethabai Nagda admitted that it was left to the option of any member of the public to boycott the company. It is true that the recommendation was not made by the defendants in furtherance of any trade interests of themselves, but I cannot see why they should be held liable merely because they had no trade interests to protect, if they bona fide considered that what they were doing was in the interest of the insuring public, and they were not actuated by any malice or ill-will towards the plaintiffs.

In my opinion a mere recommendation to boycott is not defamatory per se. It is actionable, if the plaintiffs can show that they have sustained special or actual damage, and it has been held that general loss of business is sufficient "special damage" in such cases. The plaintiffs were asked to furnish the particulars of any special damage which they may have suffered, but they have not given any beyond what they have stated in para 13 of the plaint in which it is generally alleged that the business of the company has fallen off and it has become difficult, if not impossible, to enrol new members. I will deal later with the ques-

12. Trollope and Sons v London Building Trades Federation, (1895) 11 T L R 228.
13. Ware and De Freville, Ltd. v. Motor Trade Association, (1921) 3 K B 40=90 L J K B 949=37 T L R 213=65 S J 239=125 L T 265.

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tion whether in fact they have suffered special damage.

The resolution, however, is not made up merely of a recommendation to boycott. It also contains an expression of opinion in the guise of an agreement with the opinion of Mr. Vallabhbhai Patel that such companies ought to perish, and it goes on to state that the office-bearers of such companies should resign from their posts, and assistance should be given to the poor to get back the moneys which they have paid into such companies. These words clearly imply an imputation that the business should either be closed or taken into liquidation. There is further the imputation that the poor people had been robbed of their moneys. In my opinion all these words are defamatory of the plaintiff company in the way of its business, and are not a fair and bona fide comment on a matter of public interest. The plaintiff company lastly complains of a publication in the issue of the "Gujarati" of Bombay dated 16th August 1931, which reproduces the purport of the boycott resolution and the list of companies recommended for being boycotted by the public, under the heading "Fraudulent Insurance Companies depriving the poor subjects of (their) wealth". In their written statements the defendants denied that they had falsely or maliciously published or caused to be published what appeared in the "Gujarati", on 16th August 1931, and stated that they were not responsible for what was published in the said newspaper.

It was, however, admitted by defendant 11, in his evidence that the publication in the "Gujarati" was at the instance of the defendants' committee, but he denied that the defendants gave this heading to the proprietor and editor of the "Gujarati" or that the defendants were responsible for the same. It would certainly be defamatory to allege of a company or corporation that it was fraudulent, for this would affect it prejudicially in the way of its business. It cannot be said that the words are a fair and bona fide comment on a matter of public interest. A defamatory imputation may be conveyed not merely by a direct statement, but also indirectly by means of headings, head-lines, figures of speech, and in various other ways. The defendants, however, deny that they gave the heading to the editor of the "Gujarati". The publication is one of a series of articles in the "Gujarati" which commenced on 19th July 1931. The proprietor and editor of the "Gujarati", Natvarlal Ichharam Desai, was examined, and he said that he reproduced the article from what appeared previously in the "Praja-Bandhu" of Ahmedabad. He said that the heading complained of by the plaintiff company was sent to him by defendant 11 as secretary of the defendants' committee in a covering letter. That letter, however, has not been produced, and defendent 11 denied having sent the heading as alleged. It is really a question of word against word, and in the absence of the letter, I cannot take the word of the proprietor and editor as sufficient proof of his statement. It was, however, argued that the editor was the agent of the defendants for the purposes of the publication, and that the defendants were, therefore, liable for the heading, even though it might not have been sent or suggested by them. An agent can only be liable if he has received instructions to publish the heading, or if in doing what he did he was acting within the general scope of his employment. It cannot be said that the giving of an obnoxious heading by the editor is within the scope of his employment as the defendants' agent.

It was next argued that this heading appeared in all the articles in the series, and that the defendants are liable on the ground that by not objecting to it they had impliedly ratified it. It has, however, been held that in order that there may be a valid ratification there must be not only a knowledge of the fact to be ratified, but also an intention to ratify, and that the principal must do something more than merely stand by and let his agent act in the way he chooses. Non-intervention by itself is not ratification. There is no evidence of any ratification before me, and the mere fact that the defendants may have known of the heading and did not object is not sufficient evidence for the purpose. Moerover, the editor stated that he was in the habit of changing headings himself and making alterations in the matter to be published. Further, this heading does not occur in the articles published by defendant 11 in the "Praja-Bandhu" of Ahmedabad, and on the opinion of Mr. M. K. Gandhi, published at the end of the report in English,

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all these companies are not necessarily fraudulent, but they have worked on the dividing principle and the majority of them are unsound business propositions. I therefore do not hold the defendants liable for the heading complained of. I have now dealt with all the libellous statements complained of by the plaintiff company and the defences raised by the defendants.

The only question that remains is one of damages. The plaintiff company alleges in Para. 13 of the plaint that it has been greatly injured in its credit and reputation and in the way of its business, that it has been brought into public scandal, hatred and contempt, that its business has fallen off and it has become difficult, if not impossible, for it to enrol new members and that some of the directors have resigned. The onus of proving damages is on the plaintiffs. It appears that two of the original directors resigned in July 1931, as I have said before, but there is no evidence that they resigned because of the statements complained of by the company, and neither of them has been called on behalf of the company. The plaintiff company started business in or about January 1931, but on their own showing very little business was done, even from January to June 1931, that is before the publication of the report and the resolution. The company appointed agents who signed agreements on the printed forms of the company, and several of such agreements have been put in. These were entered into between January and October 1931, and some of the agents agreed to secure as many as 5,000 cases in a year. The majority of them could not secure any. Ratansi Punsi agreed on 21st February 1931 to secure 4,000 cases in a year. He secured only four, and he could not give a satisfactory explanation why he had not secured more than four, though his agreement was made in February, and the propaganda which the defendants are alleged to have carried on against companies working on the dividing principle commenced only in May-June 1931.

He wrote to the plaintiff company on 9th July 1931, explaining why he could not secure more cases, and it is significant that though he could only secure four out of 4,000 policies between February and June he still wrote that but for the defendants' "very dirty propaganda" he would have by the date when he wrote his letter secured at least 3,000 out of the 4,000 cases under his agreement. Four other agents also wrote letters to the plaintiff company, almost on similar lines. These have been put in, though their writers have not been called to give evidence. Apart even from the genuineness of these letters, which has been doubted, there is no satisfactory reason why even a decent number of cases was not secured before June 1931. The only explanation that was offered was that the agents were busy appointing sub-agents, or were busy otherwise.

It is admitted that the company had not paid a single claim of any policy-holder, though it was alleged that they had paid directors' fees and the managing agents' remuneration. It also appears from the evidence that moneys were advanced to the company by Asbai, the wife of Lakhamsi Jehta, in cash, and the necessary entries have been made in the books of the company. The company opened a banking account in December 1930, with a sum of Rs. 1,000 out of which a sum of Rs. 500 was returned the next day, and a sum of Rs. 250 was paid soon after to the managing agents. Asbai has not been called by the plaintiffs. The plaintiffs' account books have been audited and balance sheets prepared according to the requirements of the Act, but these do not furnish an adequate and satisfactory account of what the real financial condition of the company was during the few months after its inception. Shivji Velji stated that the company would have earned two to three lakhs rupees a year. Then he said that they would have earned rupees two to three lakhs in the course of three years, that is at the rate of a lakh of rupees a year. He has prepared an estimate of the damages which the plaintiff company alleges it has sustained on the basis that it would have secured 2,500 policies in 1931, 5,000 in 1932, and 7,5000 in 1933. The total premiums would have thus come to about Rs. 2,40,000, of which thirty per cent., i. e., Rs. 72,000, would have been earned by the company, and that sum is taken as the measure of the company's loss. The only basis for this estimate seems to be that most of the small insurance companies have been doing good business, and the plaintiff company being a small insurance company, would have done

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good business likewise. This, in my opinion, is not a correct syllogism, and in any event it is not a sound basis for an estimate, considering that the company had been in existence for about six months before the publication of the statements complained of, and had done very little business during that period. With regard to the special damage consisting of general loss of custom, it was in the first place obligatory on the plaintiff company to clearly and specifically allege the special damage. They have however lumped it up with the claim for general damages by alleging a fall in their business. There is no sufficient evidence to show what the fall was before the date of the filing of the suit. The evidence as to the subsequent fall in the business is also not satisfactory. There must have been some fall in the business, but as to how much it was the only verdict can be "not proven."

The plaintiff company must therefore fall back upon their claim for general damages. It was not always easy to assess the general damage according to any legal standard of measurement. Damages are in the discretion of juries in England and of Judges in india. Imputations in the way of the business of a trading corporation or company are generally considered to be a serious matter, but all the facts and circumstances connected with the corporation or company have to be scrutinized. About the defendants' bona fides I have no doubt. As was pointed out by Lord Esher, M. R., in (1895) 2 Q B 156 (14) at p 170 "a man may use excessive language and yet have no malice in his mind"; and to use the words of Lord Dunedin in (1917) A C 309 (15) at p. 330 in considering the evidence of express malice, "no nice scales should be used." The plaintiffs' witnesses admitted that defendants were respectable persons and had no animosity towards the plaintiff company. A suggestion was made that one or two of the defendants did not want small insurance companies to flourish, as they or their near relations were interested in bigger life insurance companies. That is an allegation which has not been proved. There are no serious aggravating circumstances against the defendants in this case. I do not think that there was such excessive publication as was alleged in argument. It was also argued that the plaintiff company called upon the defendants to apologize before filing the suit, and they refused to do so. But that refusal seems to have been due to a bona fide belief that they were serving the interests of the insuring public by their strong attack on companies working on the dividing principle. Moreover, at common law the fact that the defendant has apologized to the plaintiff is no defence. It is however clear that the defendants have no grudge against the plaintiff company nor anyone connected with the plaintiff company, nor can it be said that any one of them had any axe of his own to grind. Under the circumstances it will be a fair and reasonable amount of compensation if I order the defendants to pay to the plaintiff company the sum of Rs. 1,000. I further order them to pay the plaintiffs' costs of the suit, including costs reserved, if any.

There will be a decree for the plaintiffs for Rs. 1,000, costs of the suit, including costs reserved if any, and interest on judgment at six per cent. per annum till payment.

The defendants appealed.

(The appeal was heard by Beaumont, C. J. and Blackwell, J. On 27th September 1935. Their Lordships confirmed the decree appealed from and concurred in the reasoning of the trial Judge.)

B.D./R.K. *Order accordingly.*

14. Nevil v. Fine Arts and General Insurance Co., (1895) 2 Q B 156=64 L J Q B 681=59 J P 371=72 L T 525.

Adam v. Ward, (1917) A C 309=86 L J K B 849=33 T L R 277=117 L T 34.

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BEAUMONT, C. J. AND BLACKWELL, J.

Byramji Bomanji Talati—Petitioning Creditor—Appellant.

v.

Official Assignee, Bombay—Respondent.

O. C. J. Appeal No. 30 of 1935, Decided on 11th October 1935.

*** Insolvency — Proof of debts — Debt not barred at date of act of insolvency but barred on date of adjudication can be proved.**

A creditor can prove a debt which is barred by limitation at the date of the order of adjudication of an insolvent, but is not so barred at the date of the act of insolvency on which the adjudication is founded. [P 131 C 1, 2]

N. P. Engineer—for Petitioning Creditor.

M. C. Setalvad, H. D. Banaji and *K. B. Bharucha*—for Creditor.

Official Assignee in person.

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Beaumont, C. J.—This appeal raises a short point of insolvency law, on which there appears to be no direct authority. The question is, whether a creditor can prove a debt which was barred by limitation at the date of the order of adjudication, but was not so barred at the date of the act of insolvency on which the adjudication was founded. The debt in question was incurred by the debtor on 19th November 1928; on 18th August 1931, there was an act of insolvency, on which a petition for adjudication was presented on 14th October 1931, and an order of adjudication was made on 27th March 1933. The point is not likely to arise frequently, because, as a rule, adjudication follows promptly, if it follows at all, upon an act of insolvency; but in this case there were special circumstances, which resulted in a delay of nearly two years between the act of insolvency and the order of adjudication. The Official Assignee held that the debt was provable, and his decision was upheld by the Insolvency Judge, from whose judgment this appeal is brought. The case arises under the Presidency-towns Insolvency Act, 1909. S. 17 of the Act provides that :

On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the official assignee and shall become divisible among his creditors, and thereafter, except as directed by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose.

Then S. 51 deals with the date of the commencement of the insolvency, and provides :

The insolvency of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to and to commence at (a) the time of the commission of the act of insolvency on which an order of adjudication is made against him, or (b) if the insolvent is proved to have committed more acts of insolvency than one, the time of the first of the acts of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition.

Then the section, under which the question directly arises, is S. 46, sub-s. (3), which provides :

Save as provided by sub-ss. (1) and (2), (which are not material for the present purpose)—all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable in insolvency.

It is well settled that debts which are barred by limitation are not provable in insolvency, because the debtor is not subject to such debts; and the question we have to determine is the date at which time ceases to run in favour of the insolvent. If the material date is the date of the order of adjudication, then the claimant's debt is not provable; but if the material date is the date of the commission of the act of insolvency, then the debtor was still subject to the debt at the time at which he was adjudged, and the debt is provable. In my opinion, the principle on which this case ought to be determined is well settled. Under S. 17 and S. 51, Presidency-towns Insolvency Act, the insolvency commences on the commission of the act of insolvency, and at that date the property of the insolvent vests in the Official Assignee, whose duty it is to administer it, and distribute it amongst the creditors who prove their debts. As from that date the Indian Limitation Act has no application, and the relationship of debtor and creditor ceases to exist. That principle was laid down as long ago as 1827 in (1827) 2 Gl & J 330 (1), where the Lord Chancellor says (p. 332) :

Whatever may be the technical objection, the effect of the commission clearly is to vest the property in the assignees for the benefit of the creditors; they are therefore in fact, trustees : and it is an admitted rule, that unless debts are already barred by the statute of limitations when the trust is created, they are not afterwards affected by lapse of time.

The principle was also stated by Vice-Chancellor Bacon in (1878) 10 Ch D 776 (2). The material passage in the judgment is at p. 784, and is in these terms :

The statute of limitations has nothing to do with the bankruptcy laws. When a bankruptcy ensues, there is an end to the operation of that statute, with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy, and the statute of limitations has no application at all to such a case, or to the principles by which it is governed.

The case of (1827) 2 Gl & J 330 (1) was also referred to in this connection with approval by the Court of appeal in Eng-

1. Ex parte Ross : In the matter of Coles, (1827) 2 Gl & J 330.
2. Ex parte Lancaster Banking Corporation : In re Westby, (1878) 10 Ch D 776.

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land in (1914) 2 Ch 68 (3). Channel, J., in delivering the judgment of the Court at p. 75, says this :

> As to the second point, cases were quoted beginning with (1827) 2 Gl & J 330 (1) which shew that in the bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy, and of this there can be no doubt, but this is only in the bankruptcy.

No doubt that is a dictum only, but it recognizes in clear terms what seems to me the correct principle to apply. Mr. Engineer for the petitioning creditor has relied on other sections of the Presidency-towns Insolvency Act as indicating that the true date for determining the question of limitation is the date of the order of adjudication. He relies particularly on S. 49, sub-s. (6), which provides that :

> Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent . . . .

That sub-section fixes an arbitrary date; and the fact that the legislature selected the date of adjudication as the date from which interest was to run in case of a surplus can have no bearing on the question with which we have to deal. Mr. Engineer has relied also on a decision of the English Court of Appeal in (1900) 1 Q B 546 (4), where the Court was dealing with the section relating to mutual dealings, viz., S. 38 of the English Act, which is in the same terms as S. 47, Presidency-towns Insolvency Act. For the purpose of S. 38 of the English Act, it was held that the material date at which the question of mutual dealings was to be considered was the date of the receivership order. The reason for selecting that date is given by Wright, J., at p. 555 in these terms :

> If the line were to be drawn at different times for the two purposes of proof and set off, the result might be unjust. If it were drawn for the purposes of set-off at the 'commencement of the bankruptcy,' as defined by S. 43, there would be three months (under the Act of 1869, S. 11, it would have been twelve months) during which one side of a cross-account would be growing for purposes of proof, and yet the other side would be cut short for purposes of set-off. If it were not drawn until adjudication, the injustice would be the other way, but it might be equally great.

The Court of appeal accepted Wright, J.'s view that the material date for the purpose of considering mutual set-off was the date of the receivership order, an intermediate date between the commencement of the bankruptcy and the order of adjudication, which does not exist under the Presidency-towns Insolvency Act. Whether the principle of (1900) 1 Q B 546 (4) would apply to India substituting for the date of the receivership order, the date of the adjudication order it is not material to consider. The case, in my opinion, has no real bearing upon the question whether a debt not barred at the date of the act of insolvency should be held to be provable. In my opinion the principle to be applied is the one to which I have referred, and the decision appealed from is, therefore, right. It is no doubt something of an anomaly that if the petition for adjudication had been dismissed, the claimant's debt would have been time barred. But that arises from the fact that the claim of a creditor against his debtor when not insolvent is of a different character from his claim to share in the distribution of the debtor's estate in insolvency. The appeal must be dismissed with costs. The claimant-creditor to have his costs out of the Rs. 500 deposited by the appellant in Court.

Blackwell, J. — I agree, and have nothing to add.

B.D./R K. *Appeal dismissed.*

3. Benzon, In re : Bower v. Chetwynd, (1914) 2 Ch 68=83 L J Ch 658=30 T L R 435=58 S J 430=110 L T 926.

4. Daintrey, In re : Mant, Ex parte, (1900) 1 Q B 546=69 L J Q B 207=7 Manson 107=82 L T 239.

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BARLEE AND SEN, JJ.

Dhondi Dnyanoo Sinde—Plaintiff — Appellant.

v.

Rama Bala Sinde and *others*—Defendants—Respondents.

First Appeal No. 97 of 1929, Decided on 3rd July 1935, from decision of First Class Sub-Judge, Satara, in C. S. No. 922 of 1926.

*** Hindu Law—Adoption—Propositus dying leaving his own widow, his nephew and niece — Nephew taking by survivorship—Widow adopting son after death of nephew—Estate will vest in niece—Though adoption by widow is valid yet adopted son cannot claim before niece who succeeds to her brother immediately he dies.**

A person died leaving behind him his own widow, and a nephew and a niece, children of his brother. After the death of the propositus his widow made certain alienations of joint family property. After the death of the nephew, the widow adopted a son, who claimed the pro-

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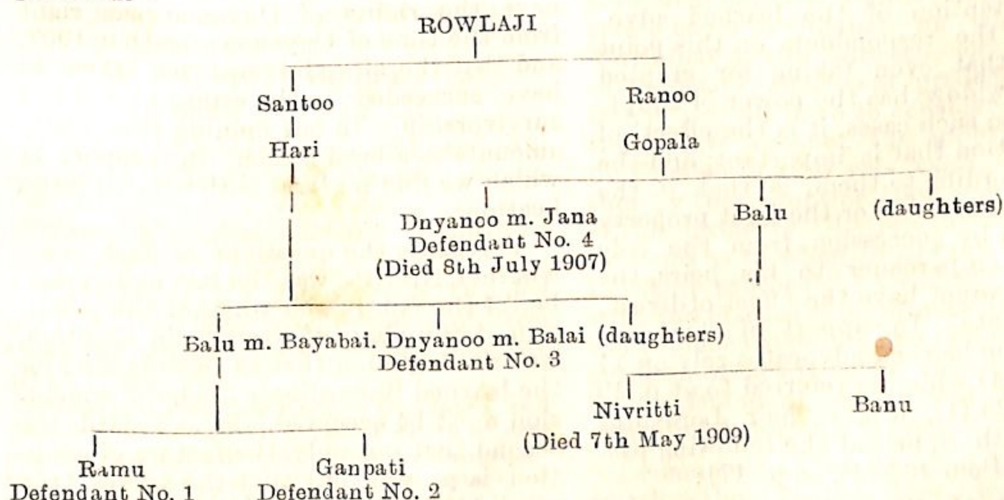
perty for himself and questioned the alienation made by the widow :

Held: that according to the law prevalent in the Bombay Presidency a Hindu widow, unless she was expressly forbidden by her husband could adopt a son to him, although he died undivided and she had not obtained the consent of his surviving coparceners. So the adoption by the widow was perfectly valid. [P 134 C 1]

Held further: that on the death of the propositus the estate passed by survivorship to the nephew, who was the sole surviving co-parcener, and that the family no longer remained joint as there was no other male member except the nephew and immediately after the death of the nephew, the estate passed by succession and not by inheritance to the sister of the nephew and the vesting of the estate with the adopted son would be postponed to that of the niece and hence the adopted son could not take his stand on the fact of his adoption and challenge the alienations: 1933 *P C* 1 and 155 and 1935 *P C* 95, *Ref.* [P 134 C 2; P 135 1 C]

K. N. Koyajee—for Appellant.
P. V. Kane and *P. B. Gajendragadkar*—for Respondents Nos. 1, 2, 12 and 13.

Sen, J.—This is an appeal against the decision of the First Class Subordinate Judge of Satara dismissing the plaintiff's suit to recover possession of the property mentioned in the plaint with future mesne profits and other consequential reliefs. The relation between the parties will be apparent from the undermentioned genealogy :



The following are the relevant dates in the order of events : Dnyanoo died on 8th July 1907. Nivritti, who is alleged to be the son of Balu, died on 7th May 1909. The gift-deed passed by Jana in favour of Dnyanoo, son of Hari, is dated 15th May 1913, and the deed of adoption adopting the plaintiff is dated 15th September 1919. On 4th July 1921, the plaintiff sold half his share in the plaint property (except items 10, 11 as specified in the plaint) to plaintiff 2. The plaintiff's case was that he had been adopted by Jana, defendant 4, wife of Dnyanoo, and that therefore the alienations made by Jana were invalid and that accordingly he and his vendee, plaintiff 2, were entitled to the property in suit. One of the contentions of the defendants was that Jana was not the widow of the last male holder, that Dnyanoo's nephew (Balu's son) Nivritti, who was a joint coparcener with Dnyanoo, had survived Dnyanoo and that therefore Jana could not legally make a valid adoption. The learned Subordinate Judge held that Nivritti was proved to have been the son of Balu and to have died after Dnyanoo. He also held that the factum of the adoption was proved. But he found that plaintiff 1's adoption was clearly invalid, on the ground that Nivritti had survived Dnyanoo. Mr. Koyajee, for the appellant, began his arguments by a reference to certain cases that have been decided by the Privy Council subsequent to the decision of the learned Subordinate Judge. In particular he referred to 60 I A 25 (1); 60 I A 242 (2) and 62 I A 161 (3).

Now, one effect of these decisions is that they establish that according to the law prevalent in this province a Hindu

1. Bhimabai v. Gurunathgouda Khandappagouda, 1933 P C 1=141 I C 9=60 I A 25=57 Bom 157 (P C).
2. Amarendra Mansingh v. Sanatan Singh, 1933 P C 155=143 I C 441=60 I A 242=12 Pat 642 (P C).
3. Vijayasingji Chhatrasingji v. Shivasangji Bhimasangji, 1935 P C 95=155 I C 493=62 I A 161=59 Bom 360 (P C).

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widow, unless she was expressly forbidden by her husband to adopt a son to him, can do so, although he died undivided and she has not obtained the consent of his surviving co-parceners. In the second case referred to, their Lordships observed that having regard to the well-established doctrine as to the religious efficacy of sonship, great caution should be observed in shutting the door upon any authorised adoption by the widow of a sonless man, as the Hindu law itself sets no limit to the exercise of such power during the lifetime of the widow. Mr. Koyajee also relied on this case particularly in support of his contention that whether there were co-parceners or not existing at the time of the adoption, and even whether the family of the deceased had remained a joint family or not at the time, the power of a widow to adopt a son remains altogether unaffected by such circumstances. One of the passages relied on in this connexion runs thus (p. 255):

> It necessarily follows, their Lordships think, from this decision, that the vesting of the property on the death of the last holder in some-one other than the adopting widow, be it either another co-parcener of the joint family, or an outsider claiming by reverter, or, their Lordships would add, by inheritance, cannot be in itself the test of the continuance or extinction of the power of adoption.

The contention of the learned advocates for the respondents on this point mainly is that even taking for granted that the widow has the power of adopting a son in such cases, it is the effect of such adoption that is important; and the effect, according to them, is that if the adoption is made after the joint property has passed by succession from the sole surviving co-parcener to his heirs, the adoption cannot have the effect of divesting the estate. In support of this contention the learned advocates rely on 14 Bom 463 (4) which is referred to at p. 40 in 60 I A 25 (1), where their Lordships quoted with approval the following passage in 14 Bom 463 (4), at p. 471:

> When the inheritance devolved from Nana (the last surviving co-parcener) upon his widow . . . . it devolved, not by succession, as in an undivided family, but strictly by inheritance, as if Nana had been a separated house-holder. Strictly speaking, according to the view taken by our Courts, there was at Nana's death no undivided family remaining into which an adopted son could be admitted by virtue of his adoption.

Their Lordships approved of this decision, but distinguished it from the case under consideration, viz., 60 I A 25 (1), on the ground that the principle in the earlier case did not apply. The contention of the learned advocates for the respondents therefore is that though Jana might have had a right to adopt a son—though they do not admit that she had such a right—the adoption could not have the effect of divesting the estate which had vested after Dnyanoo's death in Nivritti, and which later on after Nivritti's death vested in his sister Banu. This, it is contended, is not a case of property devolving by survivorship, as the plaint property, on Nivritti's death, went by rules of succession to his sister Banu, and the argument is that on the date of adoption the property in question having already been inherited by Banu, and the adopted son, being a more distant heir to Nivritti than Banu, viz., an uncle's son, could not claim the said property. In our view this line of argument is in accordance with the principles applicable to the facts of this case, and is an effective answer to the arguments advanced by Mr. Koyajee. Mr. Koyajee's arguments at their best may be put thus: that plaintiff 1, though he was adopted in the year 1919 must be taken to be and to have the rights of Dnyanoo's son right from the time of Dnyanoo's death in 1907, and that therefore he must be taken to have succeeded to the estate by right of survivorship. In our opinion this really amounts to a legal fiction, in support of which we find no legal authority or justification.

As regards the questions of fact, viz., whether Nivritti was the last male member of the family and whether the adoption of the plaintiff was a valid adoption, we are of opinion that as regards the first the learned Subordinate Judge's conclusion must be accepted, and as regards the second that not only the factum of adoption is proved, but that the widow Jana must be held to have validly adopted plaintiff 1. The learned advocates for the respondents, contest both these propositions. It is however in our opinion, unnecessary to discuss the evidence on these points at great length. On the first point the question of the onus of proof does not appear to be very important, as both the sides have adduced their evidence and the learned Subordinate Judge,

4. Chandra v. Gojarabai, (1890) 14 Bom 463.

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before whom the evidence was given and who had an opportunity of observing the demeanour of the witnesses, has, in our opinion, rightly come to the conclusion that Nivritti was the son of Balu, and that he survived Dnyanoo who died in the year 1907. As regards the second point, in view of the recent Privy Council rulings referred to, there is no doubt in our minds that the adoption of plaintiff 1 by Jana, defendant 4, was a valid adoption. Now, starting from these two facts, it seems to us that the legal position as regards the effect of the adoption is, as I have already stated, that at the date of the adoption the position of the adopted son could not be that of a son who came into a joint family; the family in the present case had already lost its character as joint family, there being no other male member of the family except Nivritti. That being so, the rights of the adopted son to succession must be postponed after those of Banu, the sister of Nivritti. In view of this conclusion we must hold that the plaintiff is not in a position to challenge the alienations made by defendant 4 and cannot, during the lifetime of Banu, take his stand on his adoption for this purpose. Therefore the plaintiff's suit must fail and the appeal must be dismissed with costs.

B.D./R.K. *Appeal dismissed.*

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BARLEE AND SEN, JJ.

Umabai Bhagwant Rajaram and *another*—Defendants—Appellants.

v.

Nani Mahadev Jakhadi—Plaintiff—Respondent.

First Appeal No. 245 of 1929, Decided on 12th July 1935, from decision of First Class Sub-Judge, Nasik, in Civil Suit No. 40 of 1928.

*** Hindu Law—Adoption — Daughter and daughter-in-law surviving after death of propositus and his wife—Adoption by daughter-in-law is valid and divests the estate of daughter as her father's heir and vests it in adopted son.**

A Hindu belonging to Bombay School of Mitakshara, died leaving behind him his own widow, daughter and a widow of his predeceased son. The son's widow after the death of her mother-in-law adopted a son. The question was whether the adoption was invalid and whether even if the adoption was valid, it would have the effect of divesting the estate from the daughter to which she would be entitled as her father's heir:

Held: that the vesting of the property in the daughter did not extinguish the right of the son's widow to adopt, a right which was co-extensive with her duty to provide a son for her husband. [P 136 C 2]

Held also: that it had always been assumed that the effect of a valid adoption was to give the adopted son the status of a natural son of his father for all purposes. Therefore the adopted son was entitled to the estate to which his father was an heir: 1933 *P C* 1; 1933 *P C* 155 and 1918 *P C* 192, *Foll.* [P 137 C 2]

A. G. Desai—for Appellants.

Y. B. Rege and *K. B. Sukhatankar*—for Respondent.

Barlee, J.—The plaintiff, Nani Durgabai, is the daughter of one Rajaram Trimbak deceased. Defendant 1, Umabai, is the widow of Bhagwant, Rajaram's only son. Defendant 2, Murlidhar, called Murlidhar Bhagwant, is a boy adopted by Umabai as the son of Bhagwant after Bhagwant's death. The family consisted of Rajaram, his son Bhagwant, his daughter Nani, his wife Krishnabai, and his daughter-in-law Umabai. On 6th March 1915, Rajaram died, and the first question which we have to decide is whether his son Bhagwant predeceased him, as Nani says, or whether Bhagwant died on 25th March 1915, as Umabai says. If Umabai is correct, then Bhagwant, who was joint with his father, was the last male member of the joint family and his estate came to Umabai, his widow, and Murlidhar as the adopted son. But if, as Nani says, Bhagwant predeceased his father, we will have to consider the question of law whether the adoption made by Umabai in 1927 was valid and whether by that adoption Nani was divested of the property. (After discussing the evidence as to when Bhagwant died, his Lordship proceeded.) Generally we agree with the learned Subordinate Judge that the evidence given by the plaintiff on this question of fact is better than that given by the defendant and we find that Bhagwant died before his father.

I come now to the issues of law: first, whether the adoption made by Umabai in 1927 was valid; and, secondly, whether the estate which had vested in Nani was thereby divested. At the time the joint family had come to an end, and Nani had succeeded as heir of her father Rajaram, on the death of her mother Krishnabai who had a widow's estate. The learned Subordinate Judge followed the decisions of this Court, summarized by Sir

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Dinshaw Mulla at pp. 520 and 523 of his Principles of Hindu Law, 7th Edn.:

In the Bombay Presidency, a widow may adopt to her husband if an authority to adopt was given to her by her husband. Even in the absence of such authority, she may adopt, if the husband was separate at the time of his death, without the consent of her husband's sapindas. But if he was joint, she can adopt only with the consent of his undivided co-parceners.

Section 471 adds that it is only in one or other capacity (i. e. as a widow or mother) that the widow can adopt and in such a case she divests no estate except her own. These authorities have been reviewed by the Privy Council in the recent cases of 60 I A 25 (1) and 60 I A 242 (2). In *Bhimabai's* case (1) stress was laid on the religious duty of adoption, and their Lordships held that the view taken by a Full Bench of the Court in 6 Bom 498 (3) was erroneous. In that case it had been held that a widow in a joint family was not entitled to adopt without the consent of her deceased husband's surviving co-parceners. It is now clear that consent is implied in all cases. The importance of this case for our present purpose is the insistence on the duty of adoption. This is still more clearly expressed by Sir George Lowndes in 60 I A 242 (2). A Hindu governed by the Benares School of the Mitakshara law died leaving a son and widow to whom he gave authority to adopt in the event of the son's death. The son died unmarried. By a family custom females were excluded from inheritance and on the son's death the estate vested in a collateral heir. The widow then adopted. The question was whether an adoption by a widow in whom the estate had not vested was invalid. His Lordship in an exhaustive judgment re-stated the ruling in 60 I A 25 (1) that adoption is a duty, and stated that "great caution should be observed in shutting the door upon any authorized adoption." He added that there must be some limit to the exercise of the power, and then considered the argument that the power to adopt was extinguished on the vesting of the property in an heir other than the adopting widow. Amongst the cases discussed was that of 46 I A 97 (4), and I cannot do better than quote his Lordship's observations (p. 254):

In 46 I A 97 (4) the litigation related to a village which had formed part of an impartible estate in the Bombay Presidency, and had been the subject of a maintenance grant to a junior branch of the family. By the custom of the family such grants reverted to the estate upon failure of male descendants of the grantee. The last holder, Kaliansing, died in October 1903, childless, but leaving a widow who some five months later adopted the appellant. The respondent, the owner of the principal estate, sued for recovery of the maintenance lands on the allegation that they vested in him on Kaliansing's death, and that consequently the adoption was invalid. . . Notwithstanding that the property had vested in the respondent, the adoption was held to be good, and the suit was dismissed. . . It necessarily follows, their Lordships think, from this decision, that the vesting of the property on the death of the last holder in some one other than the adopting widow, be it either another co-parcener of the joint family, or an outsider claiming by reverter, or, their Lordships would add, by inheritance, cannot be in itself the test of the continuance or extinction of the power of adoption. If in 46 I A 97 (4) the actual reverter of the property to the head of the family did not bring the power to an end, it would be impossible to hold in the present case that the passing by inheritance to a distant relation could have that effect any more than the passing by survivorship would in a joint family.

This settles the question finally, and it is clear that the vesting of the property in Nani the plaintiff in our case did not extinguish the right of Umabai to adopt, a right which was co-extensive with her duty to provide a son for her husband Bhagwant. But it is contended by Mr. Rege that the adoption was only valid for spiritual purposes and that it did not have the effect of divesting the estate which was held vested in Nani. The learned counsel for the respondent has relied on 14 Bom 463 (5). This case was alluded to by Sir Dinshah Mulla in his judgment in 60 I A 25 (1). The question, he says, was whether an adoption by the widow of a co-parcener, after the death of the last surviving co-parcener, and after the estate had vested in his widow or another person as his heir, was valid, and it was held that it was not. The reason for the decision was thus stated by Telang, J. (p 471):

When the inheritance devolved from Nana (the last surviving co-parcener) upon his widow Gojarabai, it devolved, not by succession, as in

1. Bhimabai v. Gurunathagouda Khandappagouda, 1933 P C 1=141 I C 9=60 I A 25=57 Bom 157 (P C).
2. Amarendra Mansingh v. Sanatan Singh, 1933 P C 155=143 I C 441=60 I A 242=12 Pat 642 (P C).
3. Ramji v. Ghamau, (1879) 6 Bom 498 (F B).
4. Pratapsing Shivsing v. Amarsingji Raisingji, 1918 P C 192=50 I C 457=46 I A 97=43 Bom 778 (P C).
5. Chandra v. Gojarabai, (1890) 14 Bom 463 (F B).

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an undivided family, but strictly by inheritance, as if Nana had been a separated house-holder. Strictly speaking, according to the view taken by our Courts, there was at Nana's death no undivided family remaining into which an adopted son could be admitted by virtue of his adoption.

This case, then, merely decided that after an undivided family has come to an end the adoption by a widow of one deceased co-parcener cannot give the adopted son the status of a co-parcener so that he will be able to divest the estate vested in a nearer heir to the last male holder. This case we ourselves have followed recently in 38 Bom L R 94 (6) where we held that although an adoption was legal and valid, it did not entitle the adopted son to the property which was in the hands of a senior heir. The same view has been taken by Broomfield and Macklin, JJ., in 37 Bom L R 786 (7). Mr. Rege would distinguish 60 I A 242 (2) by the fact that in that case the widow had been given authority to adopt in the event of her son dying. The learned counsel argues that in this case as Umabai had no express authority to adopt, no fresh adoption by her was invalid. We do not agree with this view. 60 I A 242 (2) was one from Benares and according to the Benares School of Hindu law no widow can adopt without authority. In Bombay the authority is presumed and therefore it may be said that Umabai had authority. The third argument of the learned counsel for the respondent is that Umabai's power to adopt came to an end on the death of Rajaram because Rajaram's widow, Krishnabai, took the property as hers, and he contends that a widow can only adopt to the last male holder. This view, we think, is inconsistent with the decisions of 60 I A 25 (1) and 60 I A 242 (2), which, as I have said, lay stress on the duty of adopting and do not restrict the power of adopting to the widow of the last male holder.

Lastly, the learned counsel for the respondent has urged that there is no Bombay authority for the view that an adoption, even if valid, can divest the estate of any one but the adopting widow. This is correct. The question has always been as to the validity of the adoption. In no case has the question been what is the effect of a valid adoption. But it has always been assumed that the effect of a valid adoption is to give the adopted son the status of a natural son of his father for all purposes. Therefore, if, as we hold, the adoption by Umabai was a valid adoption, then naturally Murlidhar, the adopted son, must have the rights which are due to him as the son of Bhagwant and grandson of Rajaram. In 60 I A 25 (1) and in 60 I A 242 (2), which follow closely the case of 46 I A 97 (4), the adopted son obtained a decree for possession, and apparently it was never argued that if the adoption was valid the adopted son was not entitled to possession. We must therefore hold that the adoption in this case was legal and valid and that the adopted son (Murlidhar) is entitled to the estate of Rajaram. As the son's son of Rajaram he is a nearer heir than Nani, Rajaram's daughter. The appeal therefore will succeed. We reverse the decree of the lower Court and dismiss the suit. In the circumstances of this case each party will bear its own costs throughout.

Sen, J.—I agree.

B.D./R.K. *Appeal allowed.*

6. Dhondi Dnyanoo v. Rama Bala, 1936 Bom 132=38 Bom L R 94.
7. Shankar v. Ramrao, 1935 Bom 427=159 I C 697=37 Bom L R 786.

A. I. R. 1936 Bombay 137

BROOMFIELD, J.

Ganapati Manja Hegade—Applicant.

v.

Subraya Rayappa Shetti and *others*—Opposite Parties.

Civil Revn. No. 175 of 1935, Decided on 26th September 1935, against order of Sub-Judge, Honavar, in Misc. Appln. No. 277 of 1934.

Execution- Certificate of sale can be granted to assignee of auction-purchaser.

Court can grant a sale certificate to an assignee of an auction purchaser. There is nothing in O. 21, R. 94, Civil P. C, itself which requires either that the purchaser should make the application, or that the certificate should be granted to him and to no one else. The rule is mandatory, i. e., the Court is bound to grant the certificate and in the certificate the name of the person declared to be the purchaser at the time of the sale is to be stated. The rule does not state however that he is the only person entitled to receive the certificate. Moreover S. 146, Civil P. C., lays down that where any proceedings may be taken or application made by or against any person, then the proceedings may be taken or the application made by or against any person claiming under him. So there is nothing whatever to prevent an assignee from the auction-purchaser applying for the sale certificate, nor to

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prevent the Court granting it to him : 24 *Bom* 120, *Rel. on.* ; 13 *Bom* 670, *Ref.* [P 138 C 1,2]

D. R. Manerikar—for Applicant.

Order. — The question in this case is whether the sale certificate to be granted by the Court under O. 21, R. 94, Civil Procedure Code, can be given to the assignee of the auction-purchaser. The auction-purchaser was opponent 2. He bought the lands in suit at a Court-sale and the sale in his favour has been confirmed. Subsequently he sold his right, title and interest in the lands to the applicant. The applicant asked for the sale certificate under R. 94, and his request was refused because the learned Subordinate Judge was of opinion that he had no power to issue a sale certificate to the assignee of the purchaser. I think the learned Judge is clearly wrong. He says that under the rule in question a sale certificate can be granted to a person, who at the time of sale is declared to be the purchaser. But that is not what the rule says. The rule is this :

Where a sale of immoveable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person, who at the time of the sale is declared to be the purchaser.

It is true that the marginal heading to the rule is "Certificate to Purchaser," but there is nothing in the rule itself which requires either that the purchaser should make the application, or that the certificate should be granted to him and to no one else. The rule is mandatory, i. e. the Court is bound to grant the certificate and in the certificate the name of the person declared to be the purchaser at the time of the sale is to be stated. The rule does not state however that he is the only person entitled to receive the certificate. Actually there is nothing said about any application by anybody. No doubt an application by some one is contemplated. But it has been held in 13 Bom 670 (1) that no formal application is necessary ; it may be made orally. There is an authority on the actual point in dispute in 24 Bom 120 (2). It was held there that a sale certificate may be granted to the representatives of a deceased purchaser. The learned Subordinate Judge refers to this case but thinks that it does not apply, because the applicant here being an assignee from the auction-purchaser is not his legal representative within the definition in S. 2 (11). But the case cannot really be distinguished on that ground. As Sir Lawrence Jenkins pointed out in his judgment, the rule is "callous as to whether the purchaser is alive or dead; it wants him neither as applicant nor recipient." The learned Judge also pointed out that the marginal heading cannot be allowed to control the natural meaning of the rule itself. Then there is also S. 146 of the Code to be considered. That lays down that where any proceedings may be taken or application made by or against any person, then the proceedings may be taken or the application made by or against any person claiming under him. That no doubt is subject to any contrary provision in the Code or in any other law. But as far as I am aware, there is nothing whatever to prevent an assignee from the auction-purchaser applying for the sale certificate, nor to prevent the Court granting it to him. I therefore make the rule absolute with costs, and direct, that on proof of the assignment to the applicant, if proof be required, the sale certificate should be given to him.

B.D./R.K. *Rule made absolute.*

1. Hira Ambaidas v. Tekchand Ambaidas, (1889) 13 Bom 670.
2. Re Vinayak Narayan, (1899) 24 Bom 120=1 Bom L R 645.

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* * A. I. R. 1936 Bombay 138

B. J. WADIA, J.

Bai Appibai—Plaintiff.

v.

Khimji Cooverji—Defendant.

O. C. J. Suit No. 990 of 1934, Decided on 14th December 1934.

(a) Hindu Law—Marriage—Essential ceremonies are Vivaha Homa and Saptapadi—Then marriage becomes irrevocable—Presumption arises regarding legality and regarding due ceremonies.

There are two ceremonies essential to the validity of a Hindu marriage, viz., the invocation before the consecrated fire, and the saptapadi or the taking of seven steps by the bridegroom and bride jointly before the consecrated fire. The marriage becomes perfect and irrevocable only when the seventh step is completed, for it then creates a religious tie which once tied cannot be untied. When once celebrated, the marriage cannot be dissolved, even if it has been irregularly performed. When it is proved that a marriage was performed in fact, there is a presumption of there being a marriage in law. There is also the presumption that if some of the ceremonies usually observed on such occasions have been performed, they have been duly completed: 13 *M I A* 141 (*P C*); 22 *Bom* 277 ; 22 *Bom* 509 and 38 *Cal* 700 (*PC*), *Foll.* [P 141 C 2; P 142 C 1]

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✲ **(b) Husband and Wife—Marriage—Validity—Parties entering into marriage with free consent—Misrepresentation or concealment does not affect validity of marriage—When marriage becomes invalid.**

Fraudulent misrepresentation or concealment does not affect the validity of a marriage to which the parties freely consented with knowledge of its nature and with the clear and distinct intention of entering into the marriage, unless any of the spouses is induced to go through a form of marriage with the other by threats or duress or in a state of intoxication or in an erroneous belief as to the nature of the ceremony and without real consent to the marriage. A marriage might also be invalid if the girl was abducted by force or fraud and married against her wish or that of her guardian. The test of validity is whether there was a real consent to the marriage. [P 144 C 1]

✲ ✲ **(c) Husband and Wife—Desertion—Intention to break matrimonial relations should be clear.**

There is no judicial definition of desertion that can be applied to meet the facts of every case, for the facts which constitute desertion vary with the circumstances and the mode of life of the married persons. There must, however, be clear evidence of the intention on the part of one of the spouses to break off matrimonial relations with the other, for desertion is in its essence the abandonment of the one by the other with the intention of forsaking him or her. It is the party who intends to bring the cohabitation to an end and whose conduct in reality causes its termination that commits the act of desertion: *Jackson* v. *Jackson*, (1924) *P.* 19, *Sickert* v. *Sickert*, (1899) *P.* 278 *Foll.*; *Thompson* v. *Thompson*, (1858) 1 *S. & T.* 231, *Ref.* [P 147 C 1, 2]

✲ **(d) Hindu Law—Maintenance—Matter is of personal obligation on husband—Wife's duty however is to submit to husband's authority, stay under his roof, and not to quit him without justifiable cause—Wife when becomes entitled to separate maintenance and residence stated.**

Under the Hindu law the right of a wife to maintenance is a matter of personal obligation on the husband It rests on the relations arising from the marriage, and is not dependent on or qualified by a reference to the possession of any property by the husband. The first duty of a Hindu wife, however, is to submit to her husband's authority and stay under his roof, and not to quit his house without any adequate excuse or justifying cause. If, however, the husband by reason of his misconduct, or cruelty in the sense in which that term is used by the English Matrimonial Courts, or by his refusal to maintain her, or for any other justifying cause, makes it compulsory or necessary for her to live apart from him, he must be deemed to have deserted her, and she will be entitled to separate maintenance and residence: 2 *Bom* 573 (*F B*); 9 *Bom H C R* 283 and 11 *Bom* 199, *Ref.*; 24 *W R* 377, *Disapproved*. [P 147 C 2]

(e) Husband and Wife—Agreement to remain in particular place does not offend marital rights unless agreement was to remain in one particular place for all times.

An agreement to remain in a particular place after marriage is not an agreement which offends against the marital rights of husband and wife, nor is it against public policy, unless it was an agreement to live for all time or permanently at that place in which case it would impose a restriction on the rights of the husband which if enforced might practically lead to the separation of husband and wife: 34 *Mad* 398 and 7 *Bom L R* 602, *Ref.* [P 150 C 1]

(f) Husband and Wife—Marriage—Antenuptial agreement followed by marriage is valid.

An antenuptial agreement followed by a marriage is valid and good because marriage is a valuable consideration of the highest order for such a contract. [P 150 C 2]

(g) Hindu Law — Maintenance — Amount how determined—Reasonable wants, position in life, husband's income, mode of former life and personal property of woman should be considered.

No exact rule can be laid down as to the amount claimable for maintenance. Every case has to be judged on its own facts. In determining the amount, however, the Court usually takes into consideration the reasonable wants of the woman, her position in life, her husband's means and income, as well as the mode of the former life of herself and her husband. She can claim maintenance even when she has property of her own, though that fact is also to be taken into account in determining the quantum. [P 151 C 1]

M. V. Desai and *B. G. Paranjpe*—for Plaintiff.

C. K. Daphtary and *N. H. Bhagwati*—for Defendant.

Judgment.— Plaintiff has filed this suit for a declaration that she was validly married to the defendant on 31st March 1934, at Ujjain, which is in the Gwalior State, and for an order for separate maintenance and residence against the defendant. She also claims certain ornaments or the price thereof which defendant had, according to her, promised to give her at the time of the marriage, and a further sum of Rs. 6,200 which represents the amount of her indebtedness to different creditors which he had also promised to pay at the same time. The defendant contends that this Court has no jurisdiction to try the suit. He denies that there was any ceremony of marriage according to the Hindu rites. His case is that he went through a ceremony of marriage, but some of the essential marriage rites were not performed. He also contends that the marriage was not registered in the records of the Gwalior State, as required by the law of the State, and was therefore not valid, but that contention was abandoned at the hearing. Defendant further contends that he was induced to go through a marriage ceremony on certain representa-

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tions made to him by the plaintiff or on her behalf and with her authority, which representations turned out to be false and therefore rendered the marriage null and void in law. He denies liability to provide for the separate maintenance and residence of the plaintiff, and for the ornaments and moneys claimed by her.

Issue 1 is one of jurisdiction. It is alleged in the plaint that this Court has jurisdiction, as defendant resided and carried on business in Bombay on the date of the suit, and a part of the cause of action arose in Bombay. Defendant denies this. According to him he has been living permanently in Ujjain since 1930, and only occasionally comes to Bombay, and he did not carry on business in Bombay at the time of the filing of the suit or for a considerable time prior thereto. He had a family house at Nepean Sea Road in Bombay where he formerly lived jointly with his two sons Ramdas and Gopaldas, but there was a partition between him and his sons in 1926-1927, since when the Nepean Sea Road property as well as another property were held by him and his sons in severalty. Thereafter, in 1930, a suit was filed against him and another by the Indian Cotton Co. Ltd., and another suit was filed by his son Gopaldas against him and others. In both those suits a consolidated consent decree was taken on 17th April 1931. In pursuance thereof there was a deed of partition executed on 27th May, and he ceased to have any interest in the properties, as he assigned his interest to his sons in consideration of their taking over his liability to the Indian Cotton Co. and paying certain debts due and payable by him. It was alleged that in the deed of partition the defendant has been described as a Bhatia Hindu inhabitant of Bombay, that as late as November 1933 he transferred a house at Nasik belonging to him to certain purchasers, and that in the conveyance he was also described as an inhabitant of Bombay. None of these documents has, however, been produced in Court. It is true that the defendant lived in the Nepean Sea Road house till May 1934, and in the Directory of the Bombay Telephone Co. issued in June 1934 the telephone number of the house, No. 42981, still stood in his name. Defendant, however, stated that the house had since been sold by his sons, and that at present he was staying with a friend at Ville Parle outside Bombay. The defendant is also a Justice of the Peace for the town and island of Bombay according to the notification in the Bombay Government Gazette, and it was argued that as such he could not be a permanent resident of a place outside British India. This is all the evidence as to his residence, and I cannot say that it is sufficient for the purpose of showing that the defendant dwelt in Bombay at the date of the suit.

With regard to the defendant's business it was admitted that he was a partner in the firm of Ramdas Khimji & Co., which carried on business as Muccadams in Bombay. He said that that firm was dissolved at the end of 1933, but it appears that on 30th September 1933, the firm applied for registration to the Registrar of Firms, and it was registered on 12th December 1933, under No. 2785, showing the defendant as one of the partners of the firm. He said that there was a resolution passed by the members of the firm some time in December for its dissolution, but beyond his word there is no evidence of the dissolution, and in any event the accounts of the partnership have not yet been made up. The defendant, however, admitted that on the dissolution another firm was started in the beginning of 1934 under the name of Ramdas Khimji & Brothers in which he was also a partner. That firm also did the business of Muccadams. He became a partner in the new firm as he was desirous to recoup his share of the losses of Ramdas Khimji & Co., but that he resigned as a partner on 26th May 1934, and gave letters of resignation to his sons as of that date, after which the sons stopped paying him anything out of the firm. These letters were not referred to by him until his re-examination. It is alleged in them that he retired because of his old age. In his evidence he said that he retired both on account of his old age as well as on account of the plaintiff's claim against him. Realising that no claim had been made on 26th May, he said later on that he retired because his sons wished him to retire on account of the disputes that arose between them and him over his marriage. On his own showing he was not taking any active part in the business for some time, and there was, therefore, no reason

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why his sons wanted him to retire from a business in which he took no active part. His sons, however, advertised in the Bombay Samachar of 1st June 1934, that he had retired as from 26th May, but defendant put in a counter-advertisement on 14th June stating that he had not. It suits him now to say that in fact he had retired from the business in order to support his defence of want of jurisdiction.

The genuineness of the letters of resignation has been doubted, and I do not place much reliance on them. There is no acceptance of the resignation by the sons. There is also no writing that after his resignation he would not be liable for losses, and for all purposes he still continues to be a partner and can claim accounts from the other partners of the firm. There is no evidence that he received a certain sum per month, and that his sons have stopped payment, beyond his bare word which I am not prepared to accept. On his own admission contained in his advertisement he has not retired from the firm, and presumably he is still carrying on business in Bombay. It is not necessary that he should for the purposes of the business continue to stay in Bombay, nor need the business be carried on by him personally. None of his sons, nor any of his other partners, has been called to give evidence in support of what he stated. Defendant has also a current account with various Banks in Bombay on which he has been drawing from time to time, and even after the suit was filed. He is a director of several mills and attends directors' meetings in Bombay. The firm had also a "pedhi" in Bombay, though it is said to be no longer in existence. Taking all these facts and circumstances into consideration I hold that the defendant did carry on business in Bombay at the time of the commencement of the suit.

Under the circumstances it is not necessary for the Court to consider whether any part of the cause of action in the suit arose in Bombay. The plaintiff alleges that the promises about the ornaments and about paying off her debts which she seeks to enforce and the agreement of marriage were made in Bombay. Defendant has denied these promises, and he also denies that the agreement of marriage was made in Bombay. I will deal with the promises later, but there is no doubt on the evidence that the parties agreed in Bombay to marry each other. It was contended by the defendant's counsel that the cause of action based on the promise to marry was distinct from the cause of action based on the marriage itself which took place in Ujjain, and no leave was obtained under Cl. 14, Letters Patent, for joining the several causes of action. In my opinion these are not separate causes of action as required by Cl. 14; the promises were to be carried out by the defendant on the marriage being performed. It is however not necessary for me to consider the point in further detail, as I have already held that the defendant carried on business in Bombay at the date of the suit, and the suit is therefore within the jurisdiction of this Court.

The next point in dispute between the parties is whether there was a legal and valid marriage between them. Plaintiff contends that she was legally married to the defendant according to the Vedic or Hindu rites on 31st March 1934, and that since then she lived with the defendant as his wife until disputes arose between her and the defendant in May 1934. The defendant is a Kshatriya by caste. Plaintiff says she is also of the same caste. I do not believe the defendant when he said that the plaintiff told him that her mother was a Brahmin and her father was a Kshatriya. Under the Hindu law the parties to a marrige must, unless it is otherwise allowed by custom, belong to the same caste, though they may be members of different sects or sub-divisions of the same caste. If the wife belonged to a higher caste than the caste of her husband, the marriage would be a pratiloma marriage, which is illegal; but if the wife belonged to a lower caste than the caste of her husband, the marriage would be an anuloma marriage, which has been held to be valid in Bombay. The question however does not arise here, as both parties stated that they were Kshatriyas, and nothing further was said about it. There are two ceremonies essential to the validity of a Hindu marriage, viz., the invocation before the consecrated fire, and the saptapadi or the taking of seven steps by the bridegroom and bride jointly before the consecrated fire. The marriage becomes perfect and irrevocable only when the seventh step is completed, for it then creates a religious tie which once tied

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cannot be untied. When once celebrated the marriage cannot be dissolved, even if it has been irregularly performed. It has also been held that when it is proved that a marriage was performed in fact, there is a presumption of there being a marriage in law: see 13 M I A 141 (1) and 22 Bom 277 (2). There is also the presumption that if some of the ceremonies usually observed on such occasions have been performed, they have been duly completed. 22 Bom 509 (3): see also 38 I A 122 (4).

Plaintiff stated that she came to know the defendant sometime in January 1934, whereas defendant said that he met her first in February 1934. The plaintiff is a "naikin" or dancing girl by profession, and was in the keeping of several persons as mistress from time to time. She said she was in the keeping of one Ramchandra Kamat, but she left him years ago, and thereafter Kamat died. Defendant stated that plaintiff told him that Ramchandra Kamat was her husband, and that she was his widow, and she actually showed him Ramchandra's photo in her room as that of her deceased husband. Plaintiff denied that she ever said that she was a widow, and no question was put to her about the photograph. Until December 1933, she was in the keeping of another man who died about that time. When she was in his keeping, she was living at Ridge Road, but she shifted to Abubakar Mansion, Walkeshwar, in November 1933, and it was there that she met the defendant. There is considerable difference in the two versions of the meetings and negotiations between the plaintiff and the defendant before the marriage. Plaintiff said that the defendant's intimacy with her soon grew, and she suggested that she should be his "bundhi," i. e., she should remain in his exclusive keeping as mistress whereas the defendant proposed to marry her, and promised to give her the ornaments which he had made for his two predeceased wives and which he said were worth about Rs. 35,000, pay off her debts, and provide her with a separate house and car in Bombay. Defendant denied having made any such promises or having at that time proposed marriage to the plaintiff. He said that it was one Narsinhrao who saw him first and suggested the idea of marriage to him. Narsinhrao is a Government contractor at Karwar. He comes from the same place from which the plaintiff comes, and he said that he knew her well, as he had formerly built for her a house there. He corroborated the plaintiff except as to the promise to pay her debts.

It is common ground that the plaintiff thereafter twice went to Ujjain on receipt of wires from the defendant and stayed with him in his house, on the first occasion for a day, and on the second for three days According to her the ornaments were shown to her by the defendant on the occasion of her second visit to Ujjain, and she enumerated them with the prices which she said the defendant mentioned to her. The subject of marriage was again broached at Ujjain, and defendant admits that there was such a talk, but he denied having shown the ornaments. He said that he told her that he would see if a "civil marriage" was possible and make inquiries. According to the plaintiff she and the defendant and Narsinhrao returned to Bombay together; defendant however stated that he came alone subsequently. He saw her in Bombay at Abubakar Mansion, and paid her small sums of money and a sum of Rs. 150 by cheque. He also transferred a Government Promissory Loan Note of Rs. 500 into the joint names of himself and plaintiff. He admits that plaintiff told him to do so as he was about to marry her. It was about this time that the agreement to marry was arrived at in Bombay. About a week before 31st March plaintiff and defendant again left for Ujjain, and plaintiff lived there in the defendant's house. Arrangements were then made for the marriage by one Nanakprasad, an Arya Samajist, and Assistant Secretary of the Vidhava Vivah Sahaik Sabha working under the supervision of Sir Ganga Ram Trust Society at Ujjain, and the parties were married at Ujjain on 31st March 1934.

On the day of the marriage both the plaintiff and the defendant signed certain forms respectively. The plaintiff said

1. Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver, (1869-70) 13 M I A 141=3 Beng L R 1=12 W R 41=2 Suther 267=2 Sar 498 (P C).
2. Fakirgauda v. Gangi, (1896) 22 Bom 277.
3. Bai Diwali v. Moti Karson, (1896) 22 Bom 509.
4. Mouji Lal v. Chandrabati Kumari, (1911) 38 Cal 700=11 I C 502=38 I A 122 (P C).

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that she did not know how to read or write English or Marathi or Hindi, and that she could only sign her name in English. The form is in English with the Hindi translation of certain particulars which are to be filled in. The form signed by the plaintiff is Ex. B, and that signed by the defendant is Ex. C. The answers on the right hand side are in English. They were admittedly written by one V. R. Vogel who according to the defendant was once his correspondence clerk, but who according to the plaintiff had introduced himself to her in Bombay as the defendant's private secretary. Defendant stated that the plaintiff gave the particulars to Mr. Vogel in his presence, and what was written down by Vogel was read and explained to her. Mr. Vogel has been examined on behalf of the defendant, but his story was somewhat different. According to him, he first made a rough draft of the plaintiff's answers to the particulars in the form on 30th March, then entered them fair in the form itself, and he read out the answers to the plaintiff. In his affidavit on the notice of motion for interim maintenance he did not refer to any incident on 30th March at all, and further stated that the plaintiff read the answers herself. Plaintiff denied that the answers were either read or explained to her. She was not sure who gave her the form to sign. At one time she said it was Nanakprasad. Then she said it was given to her by Vogel. Thereafter she stated that defendant asked her to sign. It is however a "Widow's Application Form for Marriage" and plaintiff has signed the declaration clause that the contents are correct.

Defendant also signed his form headed, "Gentleman's Application Form for Marriage" and the particulars were furnished to Mr. Vogel by himself. He is there described as a widower for the last seven years, whereas in fact he stated that he had been a widower for much more than that. Plaintiff is described as the widow of Ramchandra Kamat in the form which she signed, as both according to the defendant and Mr. Vogel she represented that she was a widow. I will deal with the subject of the defendant's representations later. It may however be here mentioned that the defendant said that there was also a third form which was filled in but which has not been preserved. According to the defendant it provided that in the event of dispute between him and the plaintiff after marriage he was to give her Rs. 10 per month for maintenance, whereas according to the plaintiff it was provided in that form that after the defendant's death the house at Ujjain was to belong to her. It was Nanakprasad who arranged for the marriage ceremonies, and he had been examined de bene. He first alleged in his affidavit on the notice of motion that he had officiated at the marriage as one of the priests, and defendant says so himself in his written statement. This was evidently a mistake, for he only supervised the ceremonies which were performed in his presence by Vasantilal Mulchand who is the "Purohit" or the priest of the Arya Samaj, assisted by another "Purohit" or priest, one Ganeshilal. Nanakprasad stated that the ceremonies lasted two to two and a half hours. He has not described them in detail, but he denied that the parties were made to sit face to face with the sacred fire between them as alleged.

Doubt has been thrown on his evidence both by the defendant and the plaintiff, but he has been corroborated substantially by Vasantilal who was also examined de bene, and Vasantilal has described the ceremonies in detail. Vasantilal stated that the knot was tied between the end of the plaintiff's sari and the defendant's shawl or "dupatta," that the "pradakshna" ceremony of going round the fire was performed by the plaintiff and the defendant, and that the ceremony of "saptapadi" was also performed by them jointly taking seven steps together near the consecrated fire. Plaintiff herself has also described the ceremonies which according to her lasted from 12 to 3 p. m., and not for 20 minutes as falsely alleged by the defendant, and she has substantially corroborated Vasantilal except as to the order in which the ceremonies were performed, and except that she said that there were seven "pradakshna" whereas Vasantilal stated that there were four. Defendant denied that the knot was tied or the "saptapadi" was performed, but he could not explain why they were omitted. According to his information and belief these ceremonies were not necessary for a widow re-marriage, but only the four "pradakshna" ceremony was necessary, which

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according to Vasantilal was performed. He has however admitted that he wanted the plaintiff to be his lawfully wedded wife according to the necessary Hindu rites. He has also admitted to the Court, though very reluctantly, that he did agree to marry the plaintiff, that in pursuance of the agreement he married her, and thereafter lived together as husband and wife until the separation in May. In my opinion there is no doubt that there was a valid and binding marriage between the parties.

The defendant however further contends that the marriage is null and void and of no legal effect because of certain representations made to him by the plaintiff or on her behalf and with her consent, which according to him were false. The representations were that plaintiff was the widow of one Ramchandra Kamat, that she was a Brahmin by caste, that she was a person of good character, and that she was willing to live with the defendant at Ujjain. The defendant also alleges that the plaintiff suppressed from him the fact that she was a "naikin" by profession, and the fact of her having been in the keeping of more than one person prior to her meeting the defendant in Bombay. It has been held that fraudulent misrepresentation or concealment does not affect the validity of a marriage to which the parties freely consented with knowledge of its nature and with the clear and distinct intention of entering into the marriage, unless one of the spouses is induced to go through a form of marriage with the other by threats or duress or in a state of intoxication or in an erroneous belief as to the nature of the ceremony and without any real consent to the marriage. A marriage might also be invalid if the girl was abducted by force or fraud and married against her wish or that of her guardian. The test of validity is whether there was a real consent to the marriage; see Halsbury, Vol XVI, para. 514, p. 278. It is not here suggested that there were any threats or duress on the part of either party in this case. There is also no doubt that the parties gave their consent to the marriage. Defendant says that the suggestion to marry the plaintiff came from Narsinhrao, but he admits that he himself proposed to the plaintiff to marry her, and the plaintiff agreed. The only difference between him and the plaintiff was that the agreement according to him was made at Ujjain, whereas the plaintiff said that it was arrived at in Bombay. I have already held that the agreement was made in Bombay.

In his evidence the defendant stated that the plaintiff never informed him that she was a 'naikin,' that on the contrary she said that she was a widow, viz. the widow of Ramachandra Kamat, and that she actually showed him the photograph of Ramachandra Kamat as that of her deceased husband. Plaintiff denies this, and both Narsinhrao and she said that defendant was distinctly informed in Bombay that she was a 'naikin'. In his written statement the defendant said that he first came to know that she was a 'naikin' in May last, whereas in his evidence he said that he came to know of it after the filing of the suit. I do not believe the defendant when he says that the plaintiff informed him that she was the widow of Ramchandra Kamat. No doubt she is so described in the form which was signed on the day of the marriage, but her explanation was that the answers were neither read out nor explained to her, and that she merely signed the form as she was told to do so by the defendant It seems to me that the plaintiff has been there described as a widow, as both Nanakprasad and Vasantilal were given to understand that the marriage was to be a widow remarriage, and the form itself, as I have said before, is headed as an application for a widow remarriage. Moreover, in the Government Loan Note of Rs. 500 which was endorsed in the joint names of the defendant and the plaintiff the name of the plaintiff is given as Appibai Arjekar. That was before the form was signed, and that does not indicate that she was the widow of Ramchandra Kamat. I do not believe the defendant when he said that plaintiff also appeared to him to be a widow. He impressed me as an unwilling witness who was never straightforward in his answers, and on whose evidence no Court could rely, nor do I believe him when he said that the plaintiff represented that she was a Brahmin by caste, though in his evidence he stated that she told him that her mother was a Brahmin and her father was a Kshatriya. With regard to the plaintiff's willingness to stay at Ujjain it has not been alleged that she agreed or was willing to stay

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there permanently, nor that the defendant had asked her whether she would.

With regard to the representation by the plaintiff that she was a person of good character I have already held that she informed him that she was a 'naikin' and a kept mistress before the marriage. The only imputation against her character after marriage which the defendant relies on is the alleged incident of 6th May 1934. The plaintiff has denied the allegation, and I am not satisfied on the evidence that it is true. With regard to representations alleged to have been made by Narsinhrao and Gole, it has not been proved that Narsinhrao made any. Gole was not called by the defendant to show that any representations were made by him on the plaintiff's behalf. None of the representations alleged by the defendant has been proved, nor is it proved that the defendant was induced to marry the plaintiff on such representations or any of them. Even if they were made, they would not, in my opinion, affect the validity of the marriage. Moreover, marriage under the Hindu law is primarily a religious sacrament, and not a contract. It is really an unalterable transaction. The plaintiff is, in my opinion, entitled to the declaration she asks for in prayer (a) of the plaint. After their marriage the plaintiff and the defendant stayed at Ujjain for about a couple of days, and they left for Bombay on 2nd April. They travelled in the same compartment from Ujjain, but were seated in different compartments at the time they reached Bombay. On arrival the defendant went to his house at Nepean Sea Road, and the plaintiff went to Abubakar Mansion, but they used to meet each other daily. After a week or a fortnight they left for Ujjain again, and from Ujjain they went on a week's tour to different places, at some of which the plaintiff was introduced as the defendant's wife. They returned to Bombay about 29th April, and once again the defendant went to live at Nepean Sea Road and the plaintiff at her own place.

After his return to Bombay the defendant was ill, and he sent for the plaintiff, and she saw him at his house. The defendant also went twice or three times to see the plaintiff at her house. It was about this time that there was some coldness growing between the plaintiff and the defendant towards one another. The reason according to her was that she was demanding the ornaments which he had promised to give her, but he was putting her off. According to the defendant the reason was that he paid her a surprise visit at her place in the afternoon of 6th May, and found that she was entertaining other visitors, to which he objected. I have already stated before that these allegations have not been proved. Thereafter the defendant left for Ujjain, and the plaintiff wrote to his munim Popatbhai to which the defendant replied by wire on 12th May, asking her to come to Ujjain. She said that she wrote back to Popatbhai that she could not come, as she had no money for her maintenance and to pay for the railway fare. It was in the month of May that the defendant's sons came to know of his marriage, and there was admittedly unpleasantness between him and his sons. On his return to Bombay he quarrelled with the plaintiff on 19th May, and she said that she tore off the list of ornaments which the defendant had given her. The defendant denies this. He said there was no quarrel at all on the 19th, for he came to Bombay on the 21st to attend directors' meetings, and went back the same day. He did not see her, as he refused to have anything to do with her. There was correspondence thereafter to which I shall refer later. In the correspondence the defendant denied the marriage, and the suit was filed on 11th July 1934.

The most important question in the suit is whether the plaintiff has made out a case for separate maintenance and residence. It is alleged in para. 8 of the plaint that she had been always ready and willing to live with the defendant and to carry out all his obligations as his wife, but the defendant declined to recognize her as his wife or to render to her her rights as such wife. The defendant denied this in para. 13 of his written statement, and has there alleged that notwithstanding the fact that the ceremony of marriage between him and the plaintiff was not a valid one, he was always willing until May 1934 that she should live with him at Ujjain as agreed. This would imply that at any rate thereafter he was not so willing. The plaintiff claims separate maintenance, presumably on the ground that she was virtually deserted by the defendant after he had first denied the

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validity of the marriage itself. It is true that she has not pleaded desertion in her plaint in so many words, though in her letter of 28th May 1934, she has charged the defendant with neglecting her, and in her attorney's letter of 18th June 1934, she alleges that the defendant had "practically deserted" her. This case of desertion might have been pleaded more clearly, but it was clear from the very commencement of the hearing that her claim for maintenance was based on desertion, and evidence was led to that effect. In 61 I A 224 (5), the Privy Council have expressed their disinclination to stress the structure of pleadings too strictly, if fair notice of the plaintiff's case has been given and issue joined on an inquiry but faintly adumbrated. There is no specific issue in this case as to desertion, but the question has to be considered in determining the issue whether the plaintiff is entitled to separate maintenance. It was argued by counsel for the defendant that the plaintiff's proper remedy on the alleged desertion was to have sued the defendant for restitution of conjugal rights. Whether she should or should not have done so is not a matter which is for me to consider. The most important question is whether she is entitled to separate maintenance, and before discussing the law on the subject I will deal briefly with the facts.

It is common ground that the plaintiff and the defendant came to Bombay from their tour on 29th April. It is alleged that he paid her the sum of Rs. 50 on 17th April, but plaintiff denies this; it is most unlikely, as on that day they were on their tour. Defendant has further alleged the payment of Rs. 150 on 8th May in para. 41 of his affidavit dated 2nd August 1934, on the notice of motion. Plaintiff denied having received that sum, and in his evidence defendant stated he did not remember whether he paid that sum or not. It appears that she received no payment in May, except that the defendant paid Rs. 50 to a grain merchant for having supplied provisions to her. Defendant left for Ujjain about 9th May, but he said that the plaintiff wanted to remain in Bombay and not to accompany him, to which he did not object. Thereafter she wrote to him the letter to which I have referred before, and the defendant sent the wire on 12th May. He said that in spite of the incident of 6th May, he wanted to give the plaintiff one more opportunity to mend. Plaintiff wrote back that she had not the money to go to Ujjain. Defendant denies that Popatbhai received such a letter, but Popatbhai has not been called, and in correspondence the defendant's attorneys have not explicitly denied the receipt of such a letter. All that they said was that the defendant was looking for it but could not find it. It is, however, clear that about this time the defendant would have nothing to do any more with the plaintiff, for when he came to Bombay on 21st May, he did not see her but left the same day for Ujjain. Correspondence ensued, and the plaintiff wrote her letter of 28th May in which she distinctly stated that she was starving for want of money for her maintenance, that she was neglected by the defendant, and she asked him to arrange for her maintenance and to see her about it. The defendant sent no reply.

Thereafter she sent registered letters on 29th May to his address at Ujjain, Nepean Sea Road, and to his office. The first two letters were returned 'refused.' The letter addressed to his office was received by the defendant, but he sent no reply. The plaintiff next wrote through her attorneys on 18th June 1934, in which she set out her case and all the promises which she said the defendant had made to her. Even this letter was not accepted at first, and a copy was sent to the defendant along with the registered letter on 20th June, to which he replied through his Ujjain pleader on 23rd June denying the marriage, denying that he had made any promises, and asking her to refrain from making such false allegations in public; he also claimed Rs. 20,000 damages for loss of reputation. It appears that about this time a reference was made in a magazine called the 'Bhatia Yuvak' to his marriage with the plaintiff. In a subsequent number of that magazine he put in a notice denying the marriage. In his written statement he persisted in denying the marriage, and until he went into the box he made no offer either to maintain her or to take her back or call her again to his house, in spite of her complaint that she had been starving and

5. Someshwar v. Tirbhawan 1934 P C 130=149 I C 480=61 I A 224=9 Luck178 (P C).

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was neglected. On these facts can it be said that the defendant deserted the plaintiff about the middle of May 1934? It is difficult to define what desertion is. There is no judicial definition of desertion that can be applied to meet the facts of every case, for the facts which constitute desertion vary with the circumstances and the mode of life of the married persons: see (1924) P 19 (6). There must, however, be clear evidence of the intention on the part of one of the spouses to break off matrimonial relations with the other, for desertion is in its essence the abandonment of the one by the other with the intention of forsaking him or her. It was held in 1 S & T 231 (7) that to constitute wilful desertion on the part of the husband his absence and the cessation of cohabitation must be in spite of the wish of the wife, and that she must not be a consenting party to it. In a later case, 1 P & M 694 (8), it was observed by Lord Penzance at p. 698 that no one could desert who did not actively and wilfully bring to an end an existing state of cohabitation. According to him "desertion means abandonment, and implies an active withdrawal from a cohabitation that exists." But it was held in (1923) P 18 (9) that this was not an exhaustive definition of desertion, and that the conduct of the party charged must be looked at.

There is no doubt that the defendant and the plaintiff were living together as man and wife until the desertion took place. They cohabited as husband and wife until the defendant left for Ujjain about 9th May, and when he left he had no objection to the plaintiff remaining in Bombay. On 12th May, he sent the wire from Ujjain, and it was thereafter that he ceased to have anything to do with her on the ground that she did not leave Bombay and join him at Ujjain. There is, however, no evidence that she was unwilling to do so, for I believe her, when she said that she wrote a letter to Popatbhai, the defendant's munim, stating that she could not come as she had no moneys with her at the time. It is necessary in such cases as stated before to consider the conduct of both parties, and to see whether it was the husband who deserted the wife or whether the wife rather deserted her husband; and taking all the facts and circumstances into consideration, I am of opinion, that it was the defendant who deserted the plaintiff. He alleges misconduct on her part on 6th May which he has not been able to prove. Thereafter he denied the marriage, and on his own admission refused to have anything to do with her. In the case of 68 L J P D & A 83 (10) the husband wrote to the wife: "I am not going to have anything more to do with you as man and wife." In this case there is of course no writing, nor is it in evidence that the defendant said so to the plaintiff orally, but in fact this was what he meant by his conduct, as is now confirmed by his admission. It is the party who intends to bring the cohabitation to an end and whose conduct in reality causes its termination that commits the act of desertion: see (1899) P 278 (11).

The question still remains whether the plaintiff is entitled to separate maintenance. The burden lies upon her to show the special circumstances which entitle her to a separate maintenance. Under the Hindu law the right of a wife to maintenance is a matter of personal obligation on the husband. It rests on the relations arising from the marriage, and is not dependent on or qualified by a reference to the possession of any property by the husband. The first duty of a Hindu wife, however, is to submit to her husband's authority and stay under his roof, and not to quit his house without any adequate excuse or justifying cause. If, however, the husband by reason of his misconduct, or cruelty in the sense in which that term is used by the English Matrimonial Courts, or by his refusal to maintain her, or for any other justifying cause, makes it compulsory or necessary for her to live apart from him, he must be deemed to have deserted her, and she will be entitled to separate maintenance and residence. Is the desertion of the plaintiff by her husband following upon a denial of the marriage a justifying cause for allowing her separate

6. Jackson v. Jackson, (1924) P 19=93 L J P 1 =40 T L R 45=1:0 L T 188.
7. Thompson v. Thompson, (1858) 1 S & T 231 =27 L J Mat 65=6 W R 867=ı Jour N S 717.
8. Fitzgerald v. Fitzgerald, (1869) 1 P & M 694.
9. Pulford v. Pulford, (1923) P 18=92 L J P 14 =39 T L R 35=128 L T 256.
10. Huxtable v. Huxtable, (1899) 68 LJPD & A 83.
11. Sickert v. Sickert, (1899) P 278 = 68 L J P 114=48 W R 268=81 L T 495.

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maintenance? The texts collected in 2 Bom 573 (12) seem to show that a husband who deserts a "faultless wife" or a wife "obedient to his commands" is bound to maintain her even though living apart. A wife forsaken without fault may, according to Yajnavalkya, even compel her husband to pay a third of his wealth, or if poor, to provide maintenance for her: see Colebrooke's Digest of Hindu Law, Vol. 2, Book IV, 72. This is, however, a penal provision, and has been rarely enforced by the Courts. It was enforced in 9 B H C R 283 (13) against the husband's estate in the hands of his co-parceners, and this judgment was cited with approval in 11 Bom 199 (14). It was argued that the plaintiff was not "faultless", nor was she "obedient" to the defendant's commands, and reliance was placed on certain portions of her evidence where she said that she was not willing at any time to live with the defendant as his wife unless he carried out his promises, viz., to provide her with a separate house and motor car, give her ornaments, and pay off her debts.

A long question was put to her in cross-examination in that form, and she answered in the negative. But there are other answers in which she said that she was willing to continue to live with the defendant as his wife, and that she would be willing even now after all that had happened to live as his wife if he carried out his promises. It is true that she also said that she did not want to stay with him permanently at Ujjain. I will deal with the question of these promises and how far they are enforceable later on. But taking her evidence as a whole, I cannot hold that she was unwilling, until she was deserted, to carry out her obligations as a wife. There is no evidence that before she was deserted she was at any time asked by the defendant to carry out her obligations as a wife, and she insisted on the fulfilment of the antenuptial promises as a condition precedent to the carrying out of her obligations. The fact, therefore, remains that she was deserted by her husband; and it is not his case that he deserted her because she called upon him to fulfil the promises which according to him he was not bound to do. The case of 12 Bom L R 373 (15), was a case in which the husband had subjected his wife to gross cruelty after making unfounded charges against her chastity which entitled her to separate maintenance, but it was held by Chandavarkar, J., at p. 378 that cruelty was not according to Hindu law necessary in order to entitle the wife to separate maintenance if she has been unjustifiably abandoned or forsaken by the husband. Defendant's counsel further relied upon the offer made by the defendant, not in his examination-in-chief, but for the first time in cross-examination, in answer to a question by the plaintiff's counsel, that he was willing to take the plaintiff back if she came and lived with him at Ujjain, and his counsel repeated the same offer in his closing address. The Court is entitled to consider the bona fides of the husband's offer to return to his wife. But in my opinion the defendant's offer was not bona fide. It was not only belated, but was evidently prompted more by a desire to avoid the risk of payment of separate maintenance rather than by a desire to take back the plaintiff as his wife. Is the plaintiff bound to accept such an offer from a husband who had first denied the validity of the marriage and then deserted her? Defendant's counsel contended that in order to entitle the plaintiff to separate maintenance she must show that she was always ready and willing to perform her obligations as wife, even after the desertion, and to go and live with the defendant as his wife.

This, however, is not a suit for restitution of conjugal rights. It is a case for maintenance on the ground of desertion or abandonment without just cause. It was not she who quitted her husband's house of her own accord and without an adequate excuse, but it was the husband who refused to have anything to do with her after denying the validity of the marriage, and thereafter virtually refused to maintain her. See 2 Bom 634 (16), in which it was held that a wife could claim separate maintenance if the husband refused to maintain her in his

12. Savitribai v. Luximibai, (1878) 2 Bom 573 (FB).
13. Ramabai v. Trimbak Ganesh Desai, (1872) 9 B H C R 283.
14. Adhibai v. Cursandas Nathu, (1886) 11 Bom 199.
15. Sitabai v. Ramchandrarao, (1910) 12 Bom L R 373=6 I C 525.
16. Sidlingapa v. Sidava, (1878) 2 Bom 634.

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house. Counsel relied on 28 Cal 751 (17), in which it was held that it was not only a duty imposed upon a Hindu wife but a rule of the Hindu law that she must remain with her husband wherever he may choose to reside. That rule was considered in the case, because of an antenuptial agreement on the part of the husband that he would never and under no condition be at liberty to remove his wife from her mother's house, and would always carry out the mother's orders, and it was held that the agreement was not only void as being against the rule of Hindu law, but void on the ground of public policy. Such a rule cannot be imposed upon a wife who has been abandoned by her husband. Reliance was placed in that case upon a passage from Mayne's Hindu Law, which in the 9th Edn. is at p. 651, and runs as follows:

> If she quits him of her own accord, either without cause, or on account of such ordinary quarrels as are incidental to married life in general, she can set up no claim to a separate maintenance. Nothing will justify her in leavving her home except such violence as renders it unsafe for her to continue there, or such continued ill-usage as would be termed cruelty in an English matrimonial Court.

It was however pointed out in 45 Mad 812 (18) that the enumeration of causes in this passage was not exhaustive. In 24 W R 377 (19) Garth, C. J., expressed the opinion that a wife could leave her husband's house only on the ground of his cruelty, but that view is not now accepted as correct. As was pointed out by Chandavarkar, J., it is not necessary to prove cruelty in order to entitle the wife to separate maintenance, if the husband has really deserted her. It is true that the Hindu law enjoins implicit obedience on the wife. Her husband is to her as a "god" or "deity," and to be regarded as such. But I do not think that the Hindu law goes so far as to allow a husband to first abandon his wife, then to deny the validity of the marriage, then to neglect her and to refuse to have anything to do with her, and when she is driven to seek redress in a Court of law, to call upon her to show that though abandoned without just cause, she was still ready and willing to go and live with him as her husband. I do not think that the husband could under such circumstances defeat his wife's claim for separate maintenance by making an offer or rather the pretence of an offer to take her back in his house. It is no doubt difficult to deduce a general and definite rule from the various texts and authorities as to the causes which will in law justify the wife in leaving her husband's home. But if she has not quitted it of her own accord, and the husband denies that he was legally married to her and then forsakes her as if she was a total stranger to him and had no claim upon him for support, I think it is but fair and equitable to grant her the relief which she claims, provided there is no reasonable doubt about her chastity at the time she seeks that relief. No doubt, she was a "naikin" for some time previously, but defendant willingly married her, and there is no allegation against her chastity after marriage except the allegation of misconduct on 6th May which as I have held before, has not been proved. The Hindu law does not recognize divorce, and a claim for separate maintenance is, apart from S. 488, Criminal P. C., the most effective remedy which the Hindu wife has against the husband's injustice, or cruelty, or neglect.

I might here refer to the case of 29 Bom L R 332 (20) in which it was held that a husband could not get a decree straightaway for restitution of conjugal rights in a suit which was filed after he had deserted his wife, and after she had obtained an order for maintenance under S. 488, Criminal P. C., without hearing the wife in her defence, and without investigating the conduct of all the parties, as in the opinion of the Court, the suit might well have been merely a device to avoid the husband's just obligation to provide for his wife's maintenance. The conduct of the parties is certainly a matter for consideration, and considering the defendant's conduct towards his wife after 12th May it appears to me that the fault for the desertion and consequent separation lies really at his door. In my opinion the plaintiff is entitled to separate maintenance and residence. It may however be pointed out that even a decree

17. Tekait Mon Mohini Jemadi v. Basanta Kumar Singh, (1901) 28 Cal 751 =5 C W N 673.
18. Shinappaya v. Rajamma, 1922 Mad 399= 69 I C 25=45 Mad 812=43 M L J 174.
19. Sitanath Mookerjee v. Haimabutty Dabee, (1875) 24 W R 377.
20. Bai Jivi v. Narsing, 1927 Bom 264=101 I C 403=51 Bom 329=29 Bom L R 332.

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for maintenance may be set aside on the ground of the wife's subsequent misconduct : see 19 Mad 6 (21). An unchaste wife is not entitled to anything but a "bare" or "starving" maintenance, and even that may be forfeited if she continues or persists in her unchaste life.

I will now deal with the plaintiff's claim for ornaments and payment of her debts. Defendant's counsel argued that if these antenuptial agreements were in fact made, they could not be enforced, because the agreements, viz., to keep the plaintiff in Bombay, to provide her with a separate house and car, to give her ornaments and pay her debts, all hang together, and if the agreement to stay in Bombay could not be enforced on the ground that it was against Hindu law, the other agreements could not be enforced too. I do not agree with the contention that all these agreements must hang or fall together. The agreement to live in Bombay stands apart from the agreement to give her ornaments and pay off her debts, though made at the same time. I need not consider the promise to provide her with a house and a car because no relief is claimed on account of the same. It has been held that an antenuptial agreement that the married parties shall not live together or shall live separately is void both under the English and under the Hindu law : see 34 Mad 398 (22). It is also opposed to public policy.

The same principle was affirmed by Batchelor, J., in 7 Bom L R 602 (23) in the case of Khojas. An agreement however to remain in Bombay after marriage is not an agreement which offends against the marital rights of husband and wife, nor is it against public policy, unless it was an agreement to live for all time or permanently in Bombay, in which case it would impose a restriction on the rights of the husband which if enforced might practically lead to the separation of husband and wife. It has not been proved to my satisfaction that there was an agreement under which the parties were to live for all time in Bombay, but I believe the plaintiff when she said that the defendant did promise to live with her in Bombay after the marriage. He knew that she had a large establishment at Abubakar Mansion with furniture and servants and relations staying with her. No attempt was made by the defendant to have that house vacated after marriage and I do not believe the defendant when he said that the plaintiff told him that she would arrange that notice was given to the landlord to vacate, or that she actually sent away some of her furniture to her native place. On the other hand there is evidence that after the marriage the defendant made up a memo. of expenses in his own handwriting in Bombay in which he exhorted his wife to curtail expenses from Rs. 300 to Rs. 200 per month. One of the items of expenses is rent, and that meant rent for a house in and not outside Bombay. Moreover, the defendant himself has written on that memo: "We want to make it as follows," meaning that he and the plaintiff would like to cut down their expenses of living in Bombay in the manner indicated by him. The question, however, does not arise, for it is not alleged that defendant deserted the plaintiff because she refused to remain with him anywhere else than in Bombay. If she was deserted, there was nothing to prevent her from living where she chose. If she now offers to live with the defendant on certain conditions, he is not bound to accept them, but that does not affect her right to separate maintenance and residence on the ground of desertion.

The agreement to give ornaments is a separate agreement altogether, though made at the same time. An antenuptial agreement followed by a marriage is valid and good. It has been held that marriage is a valuable consideration of the highest order: for such a contract, see (1894) 1 Q B 466 (24), and the contract is enforceable. I believe the plaintiff when she said that defendant told her he would give her ornaments if she married him, and it is admitted that some ornaments were given to her, but the evidence is not sufficient to prove that the ornaments he is alleged to have shown her at Ujjain are the ornaments mentioned in the list annexed to the plaint, nor that he mentioned the prices

21. Kandasami Pillai v. Murugammal, (1896) 19 Mad 6.
22. Krishna Aiyar v. Balammal, (1910) 34 Mad 398=8 I C 412.
23. Meherally v. Sakerkhanoobai, (1905) 7 Bom L R 602.
24. Synge v. Synge, (1894) 1 Q B 466=63 L J Q B 202=42 W R 309=58 J P 396.

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to her and agreed to give her ornaments worth Rs. 35,000. It has also not been proved that the ornaments were on her person for two or three days after the marriage nor that the defendant took possession of them at an intermediate station on the way from Ujjain to Bombay. It is not even stated in the attorney's letter of 18th June that any ornaments were shown to the plaintiff at Ujjain. In my opinion the contract is unenforceable, not because it is against public policy, but for want of certainty. With regard to the payment of debts the plaintiff's case is weaker still. There is no proof that these debts are owing by her, and no creditor has been called to prove any. It is also significant to note that among the promises which according to Narsinhrao were made by the defendant to the plaintiff he does not mention the payment of her debts.

The plaintiff is, therefore, entitled to the declaration she seeks for, and to an order for separate maintenance and residence, but not for any order in respect of the ornaments and the debts. No exact rule can be laid down as to the amount claimable for maintenance. Every case has to be judged on its own facts. In determining the amount, however, the Court usually takes into consideration the reasonable wants of the plaintiff, her position in life, her husband's means and income, as well as the mode of the former life of herself and her husband. She can claim maintenance even when she has property of her own, though that fact is also to be taken into account in determining the quantum. The law on the subject was stated by the Privy Council in 8 Pat 840 (25), as follows at p. 845:

> Maintenance depends upon a gathering together of all the facts of the situation: the amount of free estate, the past life of the married parties and the families, a survey of the condition and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being, of course, had to the scale and mode of living, and to the age, habits, wants, and class of life of the parties.

These observations were made in respect of a widow's maintenance, but they would apply generally also in the case of a wife. In order to determine the amount payable to the plaintiff there is generally a reference to the Commissioner of this Court to ascertain the value of the husband's estate and his means or income, but it is not always necessary: see *Bhikubai* v. *Hariba* (1), though that was a case in which only the amount of bare maintenance was to be assessed. I do not think that in this case any useful purpose will be served by making such a reference, as the defendant's property and income have been sufficiently investigated in the course of the evidence. Taking everything into consideration, I think the fairest order I can make is to award the plaintiff Rs. 100 per month for her separate maintenance and residence during her natural life. Defendant to pay the said sum to the plaintiff, or her attorneys, as she may direct, on or before the 10th day of each month; the maintenance amount to be paid from the month of August last. Declaration in terms of prayer (a) of the plaint. Defendant to pay Rs. 100 per month to the plaintiff as directed in the judgment. Defendant to pay the plaintiff's costs of the suit, costs to be taxed as between attorney and client: see Halsbury, Vol. XVI, para. 872, at p. 428. Costs to include the costs of the *de bene* examination and of counsel's appearance thereon.

Liberty to apply.

B.D./R.K. *Suit decreed.*

[The judgment was confirmed in appeal by Beaumont, C. J. and Blackwell, J., on 4th September 1935.—*Ed.*]

25. Ekradeshwari Bahuasain v. Homeshwar Singh, 1929 P C 128=116 I C 409=56 I A 182=8 Pat 840 (P C).

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BEAUMONT C. J. AND MACKLIN, J.

Fakir Mahomed Ramzan—Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 370 of 1935, Decided on 12th November 1935, against conviction of Chief Presidency Magistrate, Bombay.

Evidence—Expert evidence — Fingerprint expert—Evidence can be accepted by Court without corroboration.

Evidence of a fingerprint expert can be accepted by the Court without corroboration. In dealing with such evidence the Court must be careful not to delegate its authority to a third party. The Court must satisfy itself that the accused is guilty and cannot hold him guilty because the expert comes forward and says that in his opinion the accused must be guilty. The Court must satisfy itself as to the value of the evidence of the expert in the same way as

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it must satisfy itself of the value of other evidence. [P 153 C 1]

The Court has to rely on expert upon two distinct points. First of all on the question of similarity between the marks, which is a question of fact on which the Court can and should, with assistance of the expert, satisfy itself ; and secondly on the point which is one for expert opinion, whether it is possible to find the fingerprint or thumb impression of two individuals corresponding in as many points of resemblance as are shown to exist between the impressions found in the case before the Court and those of the accused. In this matter Court should examine the expert as to experience he had in the way of comparison of fingerprints, and as to how much literature he has studied, and when the expert tells the Court that it is impossible to find so many characteristics identical in the fingerprints of two persons, and that statement entirely agrees with what one had read on the subject in scientific books, the Court need not hesitate in accepting the opinion : 1922 *Pat* 73 and 1923 *Lah* 622, *not Foll.*; 1923 *Mad* 178, *Ref.* [P 153 C 1,2]

B. A. Dalal—for Appellant.

K. Mc. I. Kemp and *B. G. Rao* — for the Crown.

Beaumont, C. J.—This is an appeal by the accused against his conviction on two charges under Ss. 454 and 380, I. P. C. On 13th February 1935, a theft was committed at a house in Dadyseth Agiary Lane. The police were called to the house, and they found the complainant, a woman named Kasturbai, there. She was asked to sleep somewhere else during the ensuing night, and the police then locked up the room in which the theft had taken place, and the next day they attended with the fingerprint bureau expert, who took the impressions of certain fingerprints. He found a right thumb impression on a glass jar, and the imprint of a right index finger on a box of jewellery. There was also on a glass door of the cupboard an impression of the palm of a hand, but that has not been identified. A photograph was subsequently taken of the thumb impression on the glass jar and of the impression of the right index finger on the jewellery box, and those photographs are Exs. B and C, which have been enlarged—the enlargements are Exs. F-1-A and F-2-A. On 25th February, a room in Bazar Gate Street was also burgled. The police were fetched, and as in the previous case, they brought the fingerprint expert, who found certain impressions. He found a left-thumb impression, which is Ex. D, on the glass of a cupboard door, and a palm impression on a drawer. On the evidence, and apart from that of the fingerprint expert, it would have been possible for persons who had been in the room after the theft to have left these impressions. As the procedure under the two offences appeared to be similar, a search was made amongst the fingerprint records of the police, and it was discovered that the impressions taken on these two occasions corresponded with the fingerprints of the present accused, which had been taken by the police on the occasion of a previous conviction, and accordingly the accused was arrested, and was tried by the Chief Presidency Magistrate, and convicted on both charges.

The peculiarity of the case is that there is absolutely no evidence to connect the accused with either of the offences except the evidence of the fingerprints. A witness named Sitaram Baburam Rane was called on behalf of the prosecution, who said that he was a fingerprint expert attached to the fingerprint bureau, and had been there for 12 years. He then described to the Court how he took the photographs of the impressions to which I have referred and which were found on the scene of these two offences, and then he produced fingerprints of the accused which had been taken on the occasion of the accused's previous conviction, and also fresh fingerprints which were taken after the accused was arrested on this occasion, the latter being Ex. L, and the former, Ex. K. The witness then said that there were eighteen identical ridge characteristics in nature and sequence between the left thumb impression taken in the room where the second offence was committed and the impression of the left thumb of the accused taken by the police after his arrest, and the witness further said that it is impossible to find so many as eighteen characteristics identical in the fingerprints of two persons, that is to say, his evidence is that having regard to the similarities which he found between the fingerprints found in the place of offence and the fingerprint of the accused it was impossible that anybody but the accused could have made the fingerprints in the place of the second offence. The witness also stated with reference to the right thumb impression and the impression of the right index finger, taken on

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the occasion of the first offence, that there were fifteen points of similarity between the right thumb, and seven in respect of the right index finger, and the fingerprints of the accused, and that it must have been the accused who made the marks found on the scene of the first offence. From that evidence it appears that the accused was present in both of these rooms at about the time of the respective offences, from which I think that it follows as a necessary inference that he is the person who committed the offences. It is not suggested that he had an innocent object in being in either of those two rooms.

Now it is argued by Mr. Dalal on behalf of the accused that the Court ought not to act on the uncorroborated evidence of fingerprint experts, and in support of that contention he has referred us to a good many cases. He relies particularly on 1 Pat 242 (1) and 4 Lah 246 (2). It is, in my opinion, going too far to say that the Court must insist upon corroboration of the evidence of a fingerprint expert. On the other hand the Court must be careful not to delegate its authority to a third party. The Court has to be satisfied that the accused is guilty, and the Court cannot hold him guilty merely because an expert comes forward and says that in his opinion the accused must be guilty. The Court must satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of other evidence. In the present case I am not sure how far the learned Magistrate himself went into the question of the similarity between the different marks, although he refers to that question having been gone into in cross-examination. But we have examined the photographs in evidence, which give very clear impressions. The finger and thumb marks are not smudged, and I am satisfied that there are a very large number of points of similarity between the thumb and finger impressions found in the rooms where the offences were committed, and in the impressions of the corresponding thumbs and fingers of the accused. The Court, in a case of this sort, has to rely on the expert upon two distinct points, first of all, on the question of similarity between the marks, which is a question of fact on which the Court can, and should, with the assistance of the expert satisfy itself; and secondly on the point, which is one for expert opinion, whether it is possible to find the fingerprints or thumb impressions of two individuals corresponding in as many points of resemblance as are shown to exist between the impressions found in the case before the Court and those of the accused. In the present case, I think, the witness might have been invited to go rather further than he does go. I think he might have been asked to say how much experience he had had in the way of comparison of fingerprints, and how much literature on the subject he had studied. However this science is not a new one, and when the expert tells the Court that it is impossible to find so many characteristics identical in the fingerprints of two persons as are found in this case, and when that statement entirely agrees with what one has read on the subject in scientific books, I do not think the Court need hesitate in accepting the opinion. If the science were a new one, it might have been necessary for the evidence to go rather further. As it is, I think the evidence here is sufficient to satisfy the Court that the accused must have been present in the two rooms where these offences were committed, and as I have said, from that it must follow that he was the offender. I think, therefore, the conviction was right, and the appeal should be dismissed.

Macklin, J.—I agree. No particular number of witnesses shall be required for the proof of any fact according to the Evidence Act, and I take it that the evidence of experts is subject to the same principle. It is of course necessary in the case of fingerprint experts as in the case of every other witness, whether expert or not, that the Court should exercise its own judgment upon tha evidence and not merely accept the evidence without consideration; and if the evidence of a fingerprint expert is given in such a way that the Court is able to follow it and make up its own mind as to the accuracy of that evidence and as to the accuracy of the opinions, given by the expert, I can see no reason why it should

1. Bazari Hajam v. Emperor, 1922 Pat 73=68 I C 958=23 Cr L J 638=1 Pat 242=3 P L T 526.
2. Jassu Ram v. Emperor, 1923 Lah 622=77 I C 423=25 Cr L J 375=4 Lah 246.

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not be open to the Court to convict solely upon the evidence of that witness. Reliance has been placed by the appellant upon 1 Pat 242 (1) and 4 Lah 246 (2). But in so far as they decide that a Court ought not to rely upon the evidence of an expert alone, those cases, in my opinion, go further than is necessary; and other authorities, in particular 46 Mad 715 (3) have, been quoted to us by the Crown to show that the opinion given in the two cases relied upon has not been universally followed. I agree that, in the circumstances of the present case, the evidence of the fingerprint expert was such that it was open to the Magistrate to convict on his evidence alone having made up his mind judicially that that evidence was reliable. I agree, therefore, that the appeal must be dismissed in each case.

V.B./R.K. *Appeal dismissed.*

3. Public Prosecutor v. Virammal, 1923 Mad 178=69 I C 374=23 Cr L J 694=46 Mad 715.

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BROOMFIELD AND DIVATIA, JJ.

Shapurji Sorabji and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 334 and 372 of 1935, Decided on 18th October 1935, against order of Sess. Judge, Aden.

(a) Criminal P. C. (1898), S. 235 (1)—"Transaction" is not used in technical sense.

The word 'transaction' in S. 235 (1) is a vague term. It is not intended to be interpreted in any aritificial or technical sense. Common sense and ordinary use of language must decide whether on the facts of a particular case, there is one transaction or several transactions: 1925 *Mad* 690 and 1930 *Mad* 857, *Ref.* [P 156 C 2]

(b) Criminal P. C. (1898), S. 235 (1)—Tests for determining whether series of acts form same transaction stated.

In order that a series of acts be regarded as the same transaction they must be connected together in some way as for instance by proximity of time, unity of place, unity or community of purpose or design and continuity of action. Proximity of time and unity of place are not essential though they furnish good evidence of what unites several acts. The main test must really be continuity of action by which is meant the following up of some initial act through all its consequences and incidents until the series of acts or group of connected acts come to an end either by attainment of the object or by being put an end to or abandoned. If any of those things happens and the whole process is begun over again, it is not the same transaction but a new one in spite of the fact that the same general purpose may continue: 33 *Mad* 502; 1925 *Mad* 690 and 27 *Bom* 135, *Ref.*, 30 *Bom* 49; 14 *Bom L R* 972 and 1918 *Bom* 117, *Disting.* [P 157 C 1; P 158 C 1]

(c) Criminal P. C. (1898), Ss. 235, 222 and 537—Whether breach of provisions of S. 235 or S. 222 necessitate quashing of conviction —*Quaere.*

Quaere—Whenever there is joinder of charges prohibited by the law of procedure, particularly when there is evidence called to prove the commission of offences extending over a long period, it is always extremely difficult to feel confident that the accused has not been prejudiced: 25 *Mad* 61 (*P C*); 1932 *Bom* 277 and 1930 *Mad* 857, *Ref.* [P 159 C 2]

(d) Criminal Trial—Evidence—Statements of witnesses produced by one accused though not inadmissible against co-accused must be received with caution and regarded with suspicion.

There is nothing in the law of evidence or procedure which renders the statements of witnesses produced by one accused inadmissible against a co-accused, but such evidence should be received with great caution and regarded with great suspicion, when the witnesses have nothing or little to say which benefits the person who calls them and appear to be introduced merely with the object of strengthening the case against the co-accused. The co-accused is under a serious disability in such a case. If the witnesses have been examined by the police, he is deprived of the privilege of contradicting them by their former statements as S. 162 only applies to prosecution witnesses. He may also be deprived of the benefit of S. 342, for although the Court may give him an opportunity of making statements about the evidence, that is not obligatory under the terms of the section. A further consideration of a more general nature is, that while in a public prosecution the Crown may be expected to produce all the available evidence which has a material bearing on the charges and which the prosecution is prepared to rely upon to establish those charges and one may expect that this will be done without fear and favour, malice or ulterior motive of any kind, simply with the object of placing the true facts before the Court, although the value of this guarantee of good faith may vary, in the case of defence witnesses there cannot be any such guarantee at all and there is nothing to prevent one accused person who may think his own case hopeless producing evidence with the sole object of gratifying his spite against a co-accused: 1927 *P C* 44, *Ref.* [P 160 C 1, 2]

(e) Criminal P. C. (1898), Ss. 235, 222 and 537—Charges under Ss. 408, 409, 467, 471, 420 and 403, Penal Code, against two accused—Charges of forgery in respect of different consignments of tickets supplied at intervals in batches—Held there was misjoinder of charges—Convictions quashed.

S and *J* were serving under Aden Settlement Executive Committee, the former as the Head Accountant and the latter as the accounts clerk. It was part of their duty to sell water tickets to the general public, who could thereby obtain water from the Settlement water system and to

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credit the sale proceeds to the account of the Settlement Executive Committee. In about May 1933, *J* and *S* both caused spurious ticket books to be printed, and misappropriated the proceeds, thereby committing offences of breach of trust, cheating, forgery and using forged tickets as genuine, the books were printed at intervals, in batches, between 31st May 1933, to 7th February 1935, the interval between the dates of delivery of the various consignments varying from a few days in some cases to a month or over several months, stamped with Settlement stamp or possibly replica of it, and sold in the ordinary way. The books were presented by purchasers at the water station and accepted without suspicion. *S* and *J* received the money and they kept it. On these allegations, *S* was charged with criminal breach of trust in respect of the realisations of sale proceeds of the spurious tickets, under S. 409 for forging or causing to be forged 4,100 ticket books between May 1933 to February 1935, for offence under S. 471 in respect of those tickets, and for cheating the authorities between the period of 1st March 1934 to February 1935. The charges against *J* were precisely in the same terms except that he was charged under S. 408 instead of under S. 409. Both were convicted of the respective charges and sentenced:

Held on appeal: (i) that all the offences committed in connection with any one consignment of order books, forgery, misappropriation, cheating and so on, would, no doubt, be part of the same transaction, but the offences committed in connection with any other consignment of books would not be part of the same but similar transaction. [P 157 C 1]

(ii) That the charges against the accused in respect of forgery of 4,100 books during period of May 1933 to February 1935 are illegal and contrary to provisions of S. 235 and the illegality affected all other charges. [P 159 C 1]

(iii) That the charge in respect of gross sum misappropriated over a period of one year could only be joined with the other charges at the same trial, if offences of misappropriation formed part of the same transaction with the offences of forgery, the same applying to charges of cheating. [P 159 C 1]

(iv) That the accused have been prejudiced by the trial and that the convictions must be quashed. [P 159 C 2]

C. H. Carden Noad and *Wadia*—for Shapurji.

P. B. Shingne—for the Crown.

Broomfield, J.—The appellants have been convicted by the Sessions Judge of Aden of offences under Ss. 409, 408, 420, 467 and 471, Penal Code. Both of them were employees of the Aden Settlement Executive Committee, No. 1 Shapurji Sorabji being the Head Accountant and No. 2 Jacob David the accounts clerk. One of the functions of this body is to supply water to the public on payment. This is done for the most part by the sale of water tickets issued in books of 16 for Rs. 9 per book. The price was formerly Rs. 12. Accused Nos. 1 and 2 were responsible for the sale of these books and for paying the money received into the bank. No. 1 had the books in his charge and issued them as required. No. 2 usually sold them except on Saturdays when No. 1 himself did so. No. 2 is a Jew and did not attend office on that day. From 1st February to 1st June 1934, No. 2 was on leave and the witness Saleh Saleh A. Khalifa did his work for him. Particulars of the books sold, including the serial number, the name of the purchaser and so on, were entered in a register kept for the purpose and each ticket was impressed with the settlement stamp, which accused No. 1 had in his charge. Towards the end of February 1935 the officials of the Water and Drainage Department, which is a department under the Executive Committee, discovered that water was being issued at the water stations in a quantity very largely in excess of what was accounted for by the sale of tickets entered in the sales register. It was also discovered that tickets not entered in this register were being presented at the water stations. On further investigation of the matter it was found that these unauthorized tickets to the number of 4,100 books had been printed at a Press called the Caxton Press at Steamer Point, whereas the authorized books of tickets were all printed at the material time at the Howard Press, Aden. The case for the prosecution, stating it very briefly, is that both the accused caused these spurious books to be printed and misappropriated the proceeds, thereby committing offences of breach of trust, cheating, forgery and using forged tickets as genuine. The Sessions Judge agreeing with two of the three assessors has convicted both the accused on all counts and sentenced them to various terms of imprisonment.

Learned counsel who appears for accused No. 1 in this appeal has raised a number of preliminary objections to the legality of the charges, and, as after careful consideration we have come to the conclusion that these objections must be sustained and that the illegalities vitiate the whole trial, I propose to deal with that matter first of all. The charges against accused No. 1 are these :

Firstly, that you between 1st March 1934 and the end of February 1935 being Head Ac-

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countant of the Aden Settlement and as such a public servant entrusted with dominion over money realized by the sale of Settlement water, committed criminal breach of trust, in respect of Rs. 23,511-15-0 or a portion thereof realized from the sale of water tickets which to your knowledge were not genuine.

Secondly, that during the period of May 1933 to February 1935 you forged or caused to be forged 4,100 water ticket books or a portion thereof which books were of the nature of a valuable security or receipt empowering the delivery of water.

Thirdly, that you between the abovementioned dates fraudulently caused to be used as genuine water ticket books which you knew or had reason to believe were forgeries.

Fourthly, that you between 1st March and the end of February 1935 cheated the Aden Settlement by inducing the water authorities to part with water on the strength of water tickets which to your knowledge were fraudulent, thereby committing offences punishable under Ss. 409, 467, 471 and 420, Penal Code.

The charges against accused No. 2 are in precisely the same terms except that, as he is not a public servant, he is charged with breach of trust under S. 408 instead of under S. 409. The first objection which has been taken to these charges is that the offence of breach of trust cannot have been committed because there was no entrustment to either of the accused either of the books alleged to have been forged or of the proceeds thereof. This objection we consider to be sound, but it is not very material. What these accused are alleged to have done in effect was to sell the water belonging to the Aden Settlement Committee and misappropriate the proceeds. The money which they obtained by the sale of these spurious books was undoubtedly the property of the Committee, and, although the charge of breach of trust could not be sustained, the accused might be convicted of misappropriation which might be regarded as a minor offence included in the charge of breach of trust.

The serious objection to the charges arises from the joinder of these four charges and in particular from the inclusion in the second and third charges of alleged offences of forgery extending over a period of nearly two years. From the evidence of the Manager of the Caxton Press, Jacob Cohen, and from a statement which he has prepared from his accounts, Ex. 39, it appears that these spurious books were supplied, as he says on the order of accused No. 2, in batches sometimes of 200, sometimes of 300 books and on one occasion of 100 books only. They were supplied at intervals from 3rd May 1933 to 7th February 1935. The interval between the dates of delivery of the various consignments varied from a few days in some cases to a month or even several months. Charges in respect of the total number of alleged forgeries extending over this period could only be tried on one charge and at one trial, and such charges could only be combined with the other charges of breach of trust or misappropriation and cheating, if the whole series of acts covered by the four charges can properly be considered as forming the same transaction. That is to say, the trial on these four charges is only legal if it comes within the terms of S. 235, Criminal P. C., which, as an exception to the general rule that distinct offences must be separately tried, provides in sub-s. (1) that if, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence. The word "transaction" is rather a vague term. It is not defined in the Criminal Procedure Code and no doubt it was advisedly left undefined. It is not intended to be interpreted in any artificial or technical sense. Common sense and the ordinary use of language must decide whether on the facts of a particular case we are concerned with one transaction or several transactions. In that connexion, I may refer to the observations of Reilly, J., in 49 Mad 74 (1), and also to 53 Mad 937 (2).

Let us then look at the case first from the commonsense point of view apart from any authority and let us assume for the purpose of argument that the prosecution story is true. What happened, it seems to me, must have been something like this: the accused conceived the idea of getting spurious ticket books printed, disposing of them as if they were genuine books and pocketing the proceeds. In accordance with that scheme accused No. 2 goes to the Caxton Press and orders 200 books. They are

1. Mallu Doraji v. Emperor, 1925 Mad 690=90 I C 297=26 Cr L J 1513=48 M L J 308=49 Mad 74.
2. Ramaraja Tevan, In re, 1930 Mad 857=127 I C 654=32 Cr L J 30=53 Mad 937.

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supplied, stamped with the Settlement stamp, or possibly a replica of it, and sold in the ordinary way either in the office or outside it. The books are presented by the purchasers at the water stations and accepted without suspicion. The accused have received the money and they keep it. Finding that the scheme has succeeded without any hitch, they decide to repeat the procedure. A further consignment of books is ordered and dealt with in the same way. With occasional intervals, as for instance when No. 2 was sick at the beginning of 1934, they went on ordering fresh consignments of books and disposing of them and pocketing the money for a period of nearly two years until the fraud was discovered in February 1935. Describing that state of affairs in ordinary language, I think one would call it not one transaction but a series of transactions. All the offences committed in connection with any one consignment of books, forgery, misappropriation, cheating and so on, would no doubt be part of the same transaction; but the offences committed in connection with any other consignment of books would, in my opinion, not be part of the same but of a similar transaction.

As the section itself says, in order that a series of acts be regarded as the same transaction, they must be connected together in some way. The Courts have indicated various tests to be employed to decide whether different acts are part of the same transaction or not, namely, proximity of time, unity of place, unity or community of purpose or design and continuity of action. There are numerous cases on this point. I need only refer to 33 Mad 502 (3), a case which has been frequently followed, 49 Mad 74 (1) and 27 Bom 135 (4). Proximity of time is not essential, though it often furnishes good evidence of what unites several acts into one transaction and, as Ill. (d) to S. 235 shows, it may often be a very important factor in determining whether different offences of the same kind are to be treated as part of one transaction, that is the case of a man found in possession of several counterfeit seals intending to use them for the purpose of committing several forgeries. Mr. Justice Krishnan in 49 Mad 74 (1), says that generally he agrees with the observations of the Judges in 33 Mad 502 (3), but opines that unity of place and proximity of time are not important tests at all. According to him the main test is unity of purpose, though he says that continuity of action goes with it. That, I think, is a very important qualification, for it is obvious that there may be unity or community of purpose in respect of a series of transactions or several different transactions, and, therefore, the mere existence of a common purpose cannot by itself be enough to convert a series of acts into one transaction. I think the observations of Abdur Rahim, J., in 33 Mad 502 (3), are very important in this connection. He says (p. 507):

> As regards community of purpose I think it would be going too far to lay down that the mere existence of some general purpose or design such as making money at the expense of the public is sufficient to make all acts done with that object in view, part of the same transaction. If that were so, the result would be startling; for instance, supposing it is alleged that A for the sake of gain has for the last ten years been committing a particular form of depredation on the public, viz., house-breaking and theft, in accordance with one consistent systematic plan, it is hardly conceivable that he could be tried at one trial for all the burglaries which he committed within the ten years. The purpose in view must be something particular and definite such as where a man with the object of misappropriating a particular sum of money or of cheating a particular individual of a certain amount falsifies books of account or forges a number of documents. In the present case not only is the common purpose alleged too general and vague but there cannot be said to be any continuity of action between one act of misappropriation and another. Each act of misappropriation was a completed act in itself and the original design to make money was accomplished so far as the particular sum of money was concerned, when the misappropriation took place.

That was a case in which it was alleged that a company was formed with the object of defrauding the public in a particular manner and the promoters of the company were charged with several distinct acts of embezzlement committed in the course of several years. These acts were all committed in prosecution of the general object for which the company was founded. But it was held nevertheless that they were not parts of the same transaction and could not be joined in the same charge. The ratio decidendi of the judgments in this case appears to me

3. Choragudi Venkatadri v. Emperor, (1910) 33 Mad 502=5 I C 847=11 Cr L J 258.
4. Emperor v. Sherufalli, (1902) 27 Bom 135=4 Bom L R 930.

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to apply very closely to the facts of the present case. It seems, therefore, that the main test must really be continuity of action. We have to consider what that expression means. It cannot mean, I think, merely doing the same thing or similar things continuously or repeatedly, for a recurring series of similar transactions is not, according to the ordinary use of language, the same transaction. Continuity of action in the context must, in my opinion, mean this: the following up of some initial act through all its consequences and incidents until the series of acts or group of connected acts comes to an end, either by attainment of the object or by being put an end to or abandoned. If any of those things happens and the whole process is begun over again, it is not the same transaction but a new one, in spite of the fact that the same general purpose may continue. So that, I think, if we apply the recognised tests, the procuring of 4,100 books of tickets to be printed at intervals from May 1933 to February 1935 and the disposing of them and misappropriating the proceeds is not one transaction but a series of similar transactions. It might well be different if the prosecution had alleged a conspiracy between the accused to print 4,100 books from the beginning. But there is no such charge, and, as far as I can see, that is not really the prosecution case. At any rate it is perfectly consistent with the prosecution case as presented in the evidence that the accused ordered a fresh supply of ticket books when the last was exhausted without any definite idea as to the extent of their operations, other than the obvious and natural limitation that they would not be likely to continue once they were found out.

Now every case depends on its own facts and none of the authorities cited to us has any close bearing on the present case so far as the facts are concerned. The case of 33 Mad 502 (3) is perhaps the nearest. If I may suggest an analogy it would be this: Suppose a man were to forge a railway season ticket and use it daily, it may be, for a period of three months without being detected: Suppose that having succeeded in doing that he were then to forge a new season ticket for the following quarter and were to continue to do that with impunity say for a period of two years. On the arguments which have been addressed to us on behalf of the Crown in this case it would be permissible to prosecute and charge such a man at one trial for forging eight season tickets and cheating the railway administration of the value of those tickets. But I think that would be obviously impossible. The forging of each particluar ticket together with its consequences would be a single transaction. In the present case the line of demarcation between the different transactions is not so clearly cut, but the principle seems to me to be the same.

The learned Government Pleader has cited three cases under S. 239 of the Code: 30 Bom 49 (5), 14 Bom L R 972 (6) and 43 Bom 147 (7). It is true that the same words "the same transaction" occur in this section, but it deals with the joinder of several accused persons, not with the joinder of charges, and the cases, in my opinion, do not assist in our particular difficulty, which is whether the repetition of the same course of action over a long period is to be treated as a single transaction. Reliance has also been placed on 49 Mad 74 (1), to which I have already several times referred. In that case the accused were charged with the offence of waging war under S. 121, I. P. C., and it was held that, as the waging of war is a continuing offence, a charge under that section specifying more than three offences committed in the course of the war and spread over a period more than one year does not contravene the provisions of the Code and is not illegal. But it is hardly necessary to say that forgery is not a continuing offence. You cannot prosecute a man for a career of forgery, or a course of forgery, and there is nothing in Krishnan, J's. judgment in that case which really helps the prosecution here. There was in that case continuity of action during recognisable limits, that is to say, the course of a rebellion against the State. Now I can find no such connecting line here. In fact the only connecting line is the general purpose to defraud the Aden Settlement in a

5. Emperor v Datto Hanmant, (1905) 30 Bom 49=7 Bom L R 633=2 Cr L J 578.
6. Emperor v. Ganesh Narayan, (1912) 14 Bom L R 972=17 I C 705=13 Cr L J 833.
7. Emperor v. Madhav Laxman, 1918 Bom 117=48 I C 871=20 Cr L J 71=43 Bom 147=20 Bom L R 607.

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particular manner, which I think is not enough.

The charges against the accused in respect of the forgery of 4,100 books during the period of May 1933 to February 1935 are therefore illegal and contrary to the provisions of S. 235. Moreover the illegality affects all the other charges. It is true that S. 222 of the Code allows a charge to be framed in respect of the gross sum misappropriated during a period of one year, and the form of the first charge in each case is presumably based upon that. But this charge can only be joined with the other charges at the same trial if the offences of misappropriation formed part of the same transaction with the offences of forgery. The same applies to the charges of cheating also.

It was held by the Privy Council in 28 I A 257 (8), that where an accused was charged on an indictment alleging forty-one acts extending over a period of two years the trial was plainly prohibited by the Code and illegal and that the conviction must be set aside. It has usually been held on the authority of this case that where there has been misjoinder of charges of this kind the whole trial is vitiated and the conviction must be set aside quite apart from any question of prejudice to the accused. As I pointed out recently in 34 Bom L R 590 (9), it is not altogether clear from the language used by their Lordships that they intended to go so far as that. In a later case 54 I A 96 (10), 28 I A 257 (8) was referred to and distinguished on the ground that the procedure adopted was one which the Code positively prohibited and it was possible that it might have worked actual injustice to the accused. On the authority of this later case it has been held in 53 Mad 937 (2) that S. 537, Criminal P. C. affords no real ground for the assumption that, if a mandatory provision of the Code is infringed in framing the charge, the Court must of necessity be held to have failed in administering justice to the accused, and the impugned procedure must be one that is not only prohibited by the Code but also works an actual injustice to the accused. However that may be, whenever you have a joinder of charges prohibited by the law of procedure, particularly when you have evidence called to prove the commission of offences extending over a long period, it is always extremely difficult to feel confident that the accused has not been prejudiced. Supposing the charges against the accused had been confined to the forgery of one consignment or three consignments of these ticket books within a period of one year, in that case the other charges of using the forged tickets, of misappropriating the money, and of cheating the Aden Settlement, would have had to be similarly limited and connected with the particular consignment or consignments of books mentioned in the charge. It might well be that the prosecution would have found it difficult or even impossible to establish that any particular person was responsible for the misappropriation or the cheating in respect of that particular lot of books and it might have been necessary to confine the charge to the forgery only.

In the present case both the accused have been charged with and found guilty of misappropriating a large sum of money during the whole year and with cheating the Aden Settlement in respect of the same total sum. No doubt the charge also says "or a portion thereof," but that can make no real difference It is impossible to say, under these circumstances, that the accused have not been prejudiced by the nature of the charges framed against them and the way in which the case was tried. Without therefore necessarily deciding that breach of the provisions of S. 235 in itself necessitates the quashing of the convictions, we feel that in the present case we have no alternative but to take that course. We must therefore quash the convictions on all these charges against both the accused. We direct that accused 2, who has admitted that he ordered the spurious books, should be retried on such legal charges as may be preferred against him. We do not propose to order the retrial of accused 1, because, for the reasons which I now proceed to give, we are not satisfied that the prosecution has succeeded in establishing their case against him on the merits. (His Lordship first dealt with the circumstances appearing in evidence led by

8. Subramania Iyer v. King-Emperor, (1901) 25 Mad 61=28 I A 257=8 Sar 160 (P C).
9. Emperor v. Krishnaji Dange, 1932 Bom 277 =1932 Cr C 389=138 I C 520=33 Cr L J 619 =34 Bom L R 590.
10. Abdul Rahman v. Emperor, 1927 P C 44= 100 I C 227=54 I A 96=28 Cr L J 259= 5 Rang 53 (P C).

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the prosecution against accused 1, and then continued). Before discussing the evidence of the defence witnesses on whom the learned Sessions Judge has relied against accused 1, I must first deal with Mr. Carden Noad's point that this evidence is not admissible against his client. The only authority on the question in the authorised reports seems to be 21 Cal 401 (11), and that is not directly in point. It was held there that an accused person may cross-examine a witness called by a co-accused for his defence when the case of the second accused is adverse to that of the first. But that implies of course that the evidence of such a witness may be taken into consideration against an accused person other than the one who calls the witness, and that indeed is the principle ground for the decision. We think it is impossible to say that there is anything in the law of evidence or procedure which renders the statements of witnesses produced by one accused inadmissible against a co-accused, but at the same time there are obvious reasons for receiving such evidence with great caution, and indeed for regarding it with great suspicion, when, as here, the witnesses have little or nothing to say which benefits the person who calls them and appear to be introduced merely with the object of strengthening the case against the co accused. As the learned counsel for appellant 1 points out, the co-accused is under a serious disability in such a case. If the witnesses have been examined by the police, as some of them in this case were, he is deprived of the privilege of contradicting them by their former statements. S. 162, Criminal P. C., only applies to prosecution witnesses. He may also be deprived of the benefit of S. 342 of the Code, for, though the Court may give him an opportunity of making a statement about the evidence, that is not obligatory under the terms of the section. In this case accused 1 was not given any opportunity of saying what he had to say about these witnesses called by accused 2 notwithstanding the fact that the Judge attached great importance to their evidence.

A further consideration may be mentioned of a more general nature. In a public prosecution the Crown may be expected to produce all the available evidence which has a material bearing on the charges and which the prosecution is prepared to rely upon to establish those charges. One may expect that this will be done without fear or favour, malice or ulterior motive of any kind, simply with the object of placing the true facts before the Court. The value of this guarantee of good faith may vary no doubt. But in the case of defence witnesses there cannot be any such guarantee at all, and there is nothing to prevent one accused person who may think his own case hopeless, producing evidence with the sole object of gratifying his spite against a co-accused. (His Lordship then examined the evidence led by accused 2 in defence and concluded.) In our opinion, if we had not found it necessary to quash the convictions on the ground that the charges are illegal, accused 1 would have been entitled to an acquittal on the evidence. Accused 1 should be at once released. Accused 2 should be released pending the re-trial, if any, on the same bail as before.

Divatia, J.—I agree.

V.B./R.K. *Order accordingly.*

11. Ram Chand Chatterjee v. Hanif Sheikh, (1893) 21 Cal 401.

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BEAUMONT, C. J.

Jamnabai Gulabchand Gujarati—Appellant.

v.

Dattatraya Ramchandra Gujarati and *another*—Respondents.

Second Appeal No. 241 of 1932, Decided on 9th September 1935, from decision of Dist. Judge, Poona, in Appeal No. 141 of 1931.

(a) Civil P. C. (1908), S. 100—"Benami."
The question whether a particular transaction is or is not benami, is one of fact. [P 161 C 1]

(b) Specific Relief Act (1877), S. 42—Objection under O. 21, R. 58—Attachment voluntarily withdrawn—Suit for declaration is competent under S. 42.
Where an attachment is voluntarily withdrawn by the execution creditor on an objection under O. 21, R. 58, a suit for declaration that the property is liable to attachment and sale in execution of the decree does not fall within O. 21, R. 63 but must be brought within S. 42, Specific Relief Act: 1926 *Lah* 348, *Dissent*; 1926 *Rang* 124, *Ref.* [P 161 C 2]

(c) Transfer of Property Act (1882), S. 53—"Benami" purchase is not fraudulent transfer.

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The purchase of property "benami" in the name of another is not a transfer of property in the name of that another for the purpose of S. 53. [P 161 C 2]

(d) **Specific Relief Act (1877), S. 42—Right to attach property is right to property.**

The right to attach a particular property is a right as to that property within the meaning of those words in S. 42: 1926 *Lah* 348, *Dissent.*; 1926 *Rang* 124, *Ref.* [P 161 C 2]

(e) **Civil P. C. (1908), O. 21, Rr. 58 and 63 —Suits for declaration.**

Courts ought not to encourage filing of suits where the relief claimed can be sought expeditiously and cheaply in attachment. [P 162 C 1]

D. A. Tulzapurkar—for Appellant.

M. R. Jayakar, *B. G. Thakor* and *J. G. Rele*—for Respondents 1 and 2.

Judgment.—This is a second appeal from a decision of the Assistant Judge, Poona, confirming a decree made by the Subordinate Judge, Poona. The material facts are that in 1926 defendant 2, who is the wife of defendant 1, purchased a certain house. In 1927 the plaintiff obtained a decree against defendant 1 in the Small Cause Court at Poona, and in due course he filed a darkhast to recover the amount of his decree by sale of the house which had been purchased by defendant 2, the contention of the plaintiff being that defendant 2 purchased the house as benamidar for her husband, defendant 1. On 21st July 1929 the house was attached, and defendant 2 objected to the attachment under O. 21, R. 58, Civil P. C. Thereupon the plaintiff withdrew the attachment, and the darkhast was disposed of. On 1st October 1929 the plaintiff started this suit asking for a declaration that the house in dispute is owned by defendant 1 and was purchased benami in the name of defendant 2, and that it is liable to attachment and sale in execution of the plaintiff's decree. Both the lower Courts held on the merits that the house was purchased in the name of defendant 2 as benamidar for defendant 1. That question is really one of fact, and it has not been suggested in second appeal that I should interfere with the concurrent findings of the lower Courts on that point. It is argued however, that the plaintiff's suit does not lie. Both the lower Courts agreed that the suit does not fall within O. 21, R. 63, Civil P. C., which provides that:

Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive.

That rule would have applied if the plaintiff had not withdrawn his attachment and an order had been made against him dismissing his attachment. But as that course was not adopted, I agree with the lower Courts that the case does not fall within O. 21, R. 63, Civil P. C. The trial Judge held that the case fell within S. 53, T. P. Act, but I agree with the lower appellate Court in thinking that that section is not applicable, because there was no transfer of property from defendant 1 to defendant 2. The lower appellate Court held that the case fell within S. 42, Specific Relief Act, and the real question in this appeal is whether that view is right. It is well established that the right to make a declaratory order is statutory; and this case must be brought within S. 42, Specific Relief Act, if a declaration is to be made. Now, that section, so far as material, provides that:

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled.

It is argued by the appellant that the plaintiff has not any right as to the property in question. Now, I agree that if the words in the section were "any right to any property," the argument would be unanswerable, because the plaintiff whose claim is merely that of an execution-creditor has at present no right to the property. The question, however is whether he has any right as to the property. The right which the plaintiff claims is a right to attach the property; and it seems to me that a right to attach particular property is a right as to that property. Counsel for the appellant has referred me to two cases which, he suggests, are opposed to that view. The first is 7 Lah 235 (1). All that the Court there held was that the terms of O. 21, R. 63, do not apply where an attachment has been voluntarily withdrawn by an execution-creditor.

The learned Judges, however, do say with reference to an argument that the suit was covered by S. 42, Specific Relief

1. Mulk Raj v. Ralla Ramrao Mal, 1926 Lah 348 =93 I C 997=7 Lah 235.

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Act, that O. 21, R. 63, precludes all suits but the one under the rule itself, and therefore no suit under any other provision of law was competent. I have already read the provisions of R. 63, O. 21, and I cannot accede to the view of the learned Judges that it precludes any suit at all. All that the rule does expressly is to authorise the institution of a suit and to render final an order of a character which has not been made in the suit. I am not, therefore prepared to accept the reasons given in that case for saying that the case did not fall within S. 42, Specific Relief Act.

The other case relied on is 4 Rang 22 (2). In that case the plaintiff did not proceed in attachment at all but brought his suit under S. 42, Specific Relief Act in the first instance. The learned Judges made certain observations as to the difference between the position of a person who is claiming a declaration of his own right, and that of a decree-holder who claims a declaration of the right of his judgment-debtor. The observations, I venture to think, would have been more appropriate if the relevant words of S. 42, had been right to property and not right as to property. But at the end of the judgment, the learned Judges recognise that the actual words in the section are "any right as to any property;" and, as I understand their judgment, they considered that the case did fall within S. 42, Specific Relief Act, but in exercising their discretion under that section they refused to make an order, because the plaintiff had not proceeded, as he might have done in attachment. I entirely agree that the Court ought not to encourage the filing of suits where the relief claimed can be sought expeditiously and cheaply in attachment: and if I thought that the plaintiff in this case could have obtained the relief, which he seeks, in attachment, I should not be prepared to make any declaration in his favour. But it is apparent from the judgment of the trial Court that the question whether the purchase in the name of defendant 2 was benami for defendant 1 was a somewhat complicated one, and I doubt very much whether a Court would deal with the question in execution.

I think it would probably refer the parties to a suit; and I see no reason for doubting that it was because the plaintiff took that view that he withdrew his attachment in the first instance. If in the exercise of my discretion I refuse to make a declaratory order here, it would be open to the plaintiff to attach the property again; defendant 2 would again raise her objection; the execution Court would probably refuse to deal with the matter; and the parties would then have to bring another suit of exactly the same nature as the present suit. I do not think that any useful purpose will be served by putting the parties to so much expense and delay. It seems to me that what the plaintiff in substance is claiming is a declaration of his right as to this property. I think the proper form of declaration to make is this: The Court being of opinion that the purchase of the suit property in the name of defendant 2 was benami for defendant 1, it is declared that the plaintiff in execution of his decree against defendant 1 is entitled to attach the property. That seems to me to be a declaration which falls within S. 42, Specific Relief Act. With that variation in the declaration contained in the order, the appeal will be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

2. K. R. M. A. Firm v. Maung Po Thein, 1926 Rang 124=95 I C 98=4 Rang 22.

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BARLEE, J.

Narayan Ganpat Mahajan — Appellant.

v.

Radhabai Krishnaji Mahajan—Respondent.

First Appeal No. 288 of 1933, Decided on 13th August 1935, from decision of First Class Sub-Judge, Dharwar, in Special Darkhast No. 43 of 1933.

(a) Limitation Act (1908), Art. 182, Sub-cl. (3) — Decisions referred to are orders under O. 47, R. 4 and orders in appeal against such orders.

The words "decision passed on review" mean decision passed in review proceedings under O. 47, R. 4 and orders made in appeal against such orders. Whatever such a decision is it gives a fresh starting point of limitation.

[P 163 C 2]

(b) Limitation Act (1908), Art. 182, Sub-cl. (2) —Sub-cl. (2) is not confined to appeals from decrees and covers appeals from orders under O. 47, R. 4, Civil P. C.

Sub-clause (2), Art. 182, does not refer exclusively to appeals against a decree; it refers to "a

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appeal of any sort" and covers an appeal against an order allowing an application for review: 1933 *Bom* 255 and 1932 *P C* 165, *Foll.*; 1933 *Mad* 315, *Disting.* [P 163 C 2]

(c) **Civil P. C. (1908), O. 47, R. 4—Only orders in review proceedings are orders contemplated by R. 4.**

The only orders in review proceedings contemplated by O. 47 are those under R. 4 rejecting or allowing the application. The subsequent orders are orders in suit. [P 163 C 2]

A. A. Adarkar—for Appellant.

D. R. Manerikar—for Respondent.

Judgment.—(Only portion material to this report is with respect to the question of limitation. Following is the portion of the judgment on that point):—The last point in this case is about limitation. The decree was passed in 1927 and it gave Radhabai a recurring right. She has tried in 1933 to execute it and prima facie she has lost three years' maintenance by her laches, since the claim for maintenance for 1927, 1928 and 1929 is more than three years old. But Mr. Manerikar relies on the proceedings subsequent to the decree to bring this application within time. There was an application for review, which was granted, and then there was an appeal against that order in review, and there was an order made by this Court in appeal on 9th November 1932. If the darkhastdar, Radhabai, can take advantage of these proceedings, then she is in time. The question is whether she is entitled to the benefit of Cls. 2 and 3, Art. 182. Cl. 3 runs:

Where there has been a review of judgment the date of the decision passed on the review;

and Cl. 2:

Where there has been an appeal the date of the final decree or order of the appellate Court.

Mr. Manerikar's case is that there was a review, and after that there was an appeal, and therefore it is the final decree of the appellate Court which furnishes the starting point of limitation. Mr. Adarkar has argued that there was no review; that there was merely an application for review of the judgment, but that the judgment was not reviewed. The learned advocate points out that in review matters there are two stages: First of all an application is made; that is heard and an order is passed under R. 4 rejecting it or allowing it; and then, according to the learned advocate, the judgment is actually reviewed. This interpretation of the article does not seem to me to be correct. The starting point of limitation under sub-r. (3) is the order passed on review, and the only orders under review contemplated by O. 47 are those under R. 4, made in what Mr. Adarkar calls the first stage, and the words in Art. 182 (3) presumably apply to such orders and orders made in appeal against such orders. Whether the application be rejected or allowed there can be no other order in the review proceedings. If the application be rejected, there can be none; if it succeeds, either an obvious mistake is corrected at once, or the suit is re-opened for the reception of additional evidence. In the latter case only is there what Mr. Adarkar calls a second stage; but the subsequent orders are orders in the suit. My view then is that the words in Art. 182 (3) "decision passed on review" mean a decision passed in review proceedings; and whatever such a decision is, it gives a fresh starting point of limitation. Therefore the terminus a quo is the date of the decision of this Court which reversed the decision of the Subordinate Court to grant a review.

Mr. Adarkar has contended that an appeal of this nature from an order granting review is not an appeal which comes within sub-cl. (2), Art. 182. The learned advocate has cited a Madras case in 56 Mad 458 (1), but that case was concerned with appeals from preliminary and final decrees and does not touch the point with which I have to deal. The case which binds me is the decision of our own Court in 57 Bom 388 (2), where it was decided that sub-cl. (2), Art. 182, does not refer exclusively to appeals against a decree. The decision was based on the Privy Council case of 59 I A 283 (3), where their Lordships, in discussing the meaning of this article, held that the question must be decided upon the plain words of the article, and that "where there has been an appeal of any sort," time is to run from the date of the decree of the appellate Court. Here, then, on the plain words of the article the appellant must fail, because it is beyond doubt

1. Ahammad Kutty v. Kottekkat Kuttu, 1933 Mad 315=148 I C 58=56 Mad 458=64 M L J 251.
2. Nagappa Bandappa v. Gurushantappa Shankarappa, 1933 Bom 255=147 I C 1227=57 Bom 388=35 Bom L R 432.
3. Nagendra Nath Dey v. Suresh Chandra Dey, 1932 P C 165=137 I C 529=59 I A 283=60 Cal 1 (P C).

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that there has been an appeal though not an appeal against the original decree and therefore time runs from the final decree of the appellate Court, which in this case is the date of the order in the review matter. For these reasons, the appeal must fail and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

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BEAUMONT, C. J. AND N. J. WADIA, J.

Girikant Shivlal Pandya and *others*—Appellants.

v.

Vadilal Vrijlal Shah—Respondent.

Second Appeal No. 741 of 1933, Decided on 9th August 1935, from decision of Dist. Judge, Ahmedabad, in Appeal No. 188 of 1932.

(a) Provincial Insolvency Act (1920), S. 28 (2) and (7)—Property acquired after date of petition but before adjudication vests in Court or Receiver under sub-s. (2), read with sub-s. (7).

Under the Provincial Insolvency Act property acquired or devolving upon the insolvent after the date of presenting the petition but before adjudication vests in the Court or receiver under sub-s. (2) read with sub-s. (7). [P 164 C 2]

(b) Provincial Insolvency Act (1920), S. 28 (4)—Property acquired after adjudication vests in Court eo instanti—Rule in *Cohen* v. *Mitchell* does not apply.

Under the Provincial Insolvency Act the moment the property is acquired or devolves upon the insolvent after the date of adjudication, and before his discharge, it vests eo instanti in the Court or Receiver. The rule in *Cohen* v. *Mitchell*, (25 Q B D 262) that the property acquired by the insolvent after order of adjudication does not vest in the trustee in bankruptcy unless and until trustee intervenes does not apply: 1927 *P C* 108; 1926 *Rang* 179 and 1934 *Lah* 809, *Foll.*; 1929 *Pat* 97, *Dissent.*; 1920 *Bom* 58, *Disting.* and *Expl.* [P 164 C 2; P 165 C 1]

U. L. Shah—for Appellants.

V. N. Chhatrapati—for Respondent.

Beaumont, C. J.—This is a second appeal from the decision of the District Judge of Ahmedabad and it raises a point on which there has been a certain amount of difference of judicial opinion, the question being whether what is known as the rule in 25 Q B D 262 (1), in English Bankruptcy Law applies to cases arising under the Provincial Insolvency Act (5 of 1920). The relevant facts are that a petition in insolvency was presented on 23rd June 1931, and receivers were appointed; the insolvent was adjudicated on 10th March 1932 and on 19th April 1932 the receivers gave a notice to the insolvent calling upon him to pay Rs. 1,600 which he had earned as salary after the presentation of the insolvency petition. It appears from the judgment of the learned First Class Subordinate Judge of Ahmedabad, who heard the application in the first instance, that of the Rs. 1,600, Rs. 200 were earned after adjudication. The learned Subordinate Judge held that the whole of the Rs. 1,600 were assets in the insolvency, but that the receivers were entitled to a half only of the earnings, having regard to the provisions of S. 60, Civil P. C. In appeal the learned District Judge seems to have treated the whole of the Rs. 1,600 as after-acquired property falling within the provisions of sub-s. (4) of S. 28, Provincial Insolvency Act, 1920, and he was of opinion that the rule in 25 Q B D 262 (1) applied. Now that rule is that property acquired by the insolvent after adjudication does not vest in the trustee in bankruptcy unless and until the trustee intervenes, and the learned District Judge therefore referred the case back to the lower Court in order to determine whether any part of the Rs. 1,600 had been disposed of by the insolvent before the receivers intervened.

I am rather disposed to think that the Rs. 1,400 which were earned before the adjudication would vest in the trustee under sub-s. (2), read with sub-s. (7) of S. 28, Provincial Insolvency Act; but at any rate the question as to whether after-acquired property vests on its acquisition or on the intervention of a trustee, arises in the case of Rs. 200. Sub-s. (4) of S. 28 provides that all property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge, shall forthwith vest in the Court or receiver. As was pointed out by their Lordships of the Privy Council in 54 I A 190 (2), the provision clearly means that the moment property is acquired by or devolves upon the insolvent after the date of adjudication and before his discharge, it vests eo instanti in the Court or receiver. But it is argued that we ought not to give effect to the plain meaning of the language because of the English decisions culminat-

1. Cohen v. Mitchell, (1890) 25 Q B D 262=59 L J Q B 409=7 Morrell 207=38 W R 551=63 L T 206.

2. Kala Chand Banerjee v. Jagannath Marwari, 1927 P C 108=101 I C 442=54 I A 190=54 Cal 595 (P C).

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ing in 25 Q B D 262 (1). 25 Q B D 262 (1) and the cases on which it was founded seem to approach very near to judicial legislation. The language of S. 44 English Bankruptcy Act of 1883, was not identical by any means with the language of S. 28, Provincial Insolvency Act of 1920; at the same time, taken by itself, the language appears to be clear. Under the English Act property of the bankrupt which vested in the trustee included all such property as might belong to or be vested in the bankrupt at the commencement of the bankruptcy, or might be acquired by or devolve on him before his discharge. The decision of the Court that property acquired after the date of the bankruptcy did not vest until the trustee intervened, was frankly based on considerations of inconvenience and hardship which would follow on a strict interpretation of the statute. The rule established by the Courts has now received legislative recognition in S. 47, English Bankruptcy Act of 1914.

It is, in my opinion, very difficult for this Court, construing an Act of 1920 which does not contain a provision similar to S. 47, English Bankruptcy Act of 1914, to depart from the plain meaning of the words used in order to bring Indian law into conformity with the English law. The Indian Act provides that all property which is acquired by or devolves upon the insolvent shall forthwith vest in the Court or receiver, and plainly, unless we disregard altogether the word "forthwith," we cannot say that the property did not vest until the receivers intervened. The view that after-acquired property vests at once in the Court or receiver has been adopted by the High Court of Rangoon in 4 Rang 125 (3), a decision with which I entirely agree. It was also the view of the Lahore High Court in 1934 Lah 809 (4), although a contrary view was taken by the Patna High Court in 8 Pat 478 (5). The learned District Judge considered himself bound by the decision of this Court in 44 Bom 673 (6). No doubt in that case the Court did express the view that the rule in 25 Q B D 262 (1) applied to a case arising under the Provincial Insolvency Act of 1907, S. 16 (4) which was worded similarly to S. 28 (4), of the later Act of 1920. It is, I think, more difficult to adopt that construction in the case of the later Act, owing to the passing since the earlier Act of S. 47, English Bankruptcy Act of 1914. But however that may be, the decision of the Court in 44 Bom 673 (6) is not a direct decision in point, because the question in that case was as to the liability of the insolvent to be prosecuted for having made away with after-acquired property, and the decision turned in part on the absence of mens rea, and in part also on the Provident Funds Act, 1897. Cases arising under the Presidency-towns Insolvency Act, are not really in point, because that Act, followed the phraseology of the English Bankruptcy Act of 1883, and there is more scope, therefore for adopting a construction corresponding with the construction placed upon the English Bankruptcy Act in 25 Q B D 262 (1). In my opinion, the view taken by the trial Court was right and this appeal must be allowed and the order of the trial Court restored. Costs throughout of both parties to come out of the estate.

N. J. Wadia, J.—The learned District Judge has held, on the authority of the ruling in 44 Bom 673 (6), that the rule in 25 Q B D 262 (1) applies, and that in spite of the plain meaning of the words used in S. 28 (4), Provincial Insolvency Act of 1920, the property acquired by the insolvent after the date of the order of adjudication vests in the receiver only when the receiver intervenes. The case in 44 Bom 673 (6) was decided in 1919. Subsequent to that decision the legislature enacted S. 28 (4), Provincial Insolvency Act of 1920, in exactly the same words as S. 16 (4), Provincial Insolvency Act of 1907, in spite of the attempts which the Court had made to get away from the plain meaning of the words of S. 16 (4), of the Act of 1907, by interpreting it in the light of the rule in 25 Q B D 262 (1). In my opinion the only inference which can be drawn from this is the one drawn in 4 Rang 125 (3) viz., that the insertion of the word "forthwith" by the legislature in S. 28 (4), was to sweep away the Court's attempts to postpone the vesting. This view is confirmed by the decision of

3. Ma Phaw v. Maung Ba Thaw, 1926 Rang 179 =97 I C 221=4 Rang 125.
4. Diwan Chand v. Manak Chand, 1934 Lah 809 =155 I C 938=16 Lah 392.
5. Jagdish Narain Singh v. Mt. Ramsakal Kuer, 1929 Pat 97=114 I C 465=8 Pat 478=9 P L T 969.
6. Nagindas Bhukhandas v. Ghelabhai Gulabdas, 1920 Bom 58=56 I C 449=44 Bom 673 =22 Bom L R 322.

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the Privy Council in 54 I A 190 (2) in which it was held that the meaning of S. 16, sub-s. (4), Provincial Insolvency Act of 1907, was perfectly clear, and that the moment the inheritance devolved on an insolvent who was still undischarged, it vested in the receiver. The view taken by the learned District Judge appears to me to be wrong, and I agree that the order should be reversed.

V.B./R.K. *Appeal allowed.*

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MACKLIN, J.

Krishnaji Hari Dhamdhere and *another*—Plaintiffs—Appellants.

v.

Gopal Narayan Dhamdhere and *others*—Defendants—Respondents.

Second Appeal No. 41 of 1933, Decided on 17th September 1935, from decision of Dist Judge, Poona, in Appeal No. 151 of 1931.

(a) Court-fees Act (1870), S. 7 (i) and (iv) (f)—Suit for account of rent and recovery of share—Notice calling defendant to pay fixed sum—Suit is one for accounts—Plaintiff's valuation must be accepted by Court.

A suit for accounts of the rent recovered by the defendant and for payment of the plaintiff's share in those rents when the amount recovered has been ascertained is a suit for accounts falling under S. 7 (iv) (f) and not one under S. 7 (i) and the fact that the plaintiff had, previous to the suit, given notice to the defendant calling upon him to pay a fixed sum makes no difference. In such a case it is open to the plaintiff to value his plaint as he pleased, and the plaint as valued ought to be accepted by the Court: 1915 *Bom* 59, *Foll.*; 1914 *All* 72, *Disting* [P 166 C 2; P 167 C 1, 2]

(b) Court-fees Act (1870), S. 12—Appeal lies against decision that suit falls within particular class.

Though there is no appeal against a decision as to the correct valuation for any particular class of suits, still there is an appeal against a decision that any particular suit falls within a particular class: 23 *Bom* 486, *Foll.* [P 166 C 2]

A. G. Desai and *S. A. Kher*—for Appellants Nos. 1 and 2.

S. G. Patwardhan—for Respondents Nos. 1 to 3.

Judgment.—In this second appeal both the Courts below have held that the plaint must be rejected owing to insufficient Court-fees having been paid by the plaintiffs. The legality of the order rejecting the plaint under O. 7, R. 11 (b), Civil P. C., is the only question for consideration. The suit is nominally one for accounts of the rent recovered by the defendants and for payment of the plaintiffs' share in those rents, when the amount recovered has been ascertained. The plaintiffs had previously given notice to the defendants (Ex. 80), calling upon them to pay to them a sum of Rupees 1,699-12-0. In the suit the plaintiffs put a valuation of Rs. 1,500 for pleader's fees, but no more than Rs. 200 for Court-fees. It was held by both the Courts that the valuation of Rs. 200 for the purpose of Court-fees was purely fictitious. The trial Court ordered that the plaintiffs should pay Court-fee upon the amount claimed in their notice, (Ex. 80,)holding that this would be a correct valuation of the plaintiffs' claim in the suit. When they failed to do this, their plaint was rejected, and on appeal the District Judge confirmed the order of the lower Court, holding that the plaintiffs' valuation for Court-fees at Rs. 200 only was a deliberate attempt to defeat the provisions of a fiscal enactment.

A preliminary point is taken in this appeal to the effect that no appeal lies by reason of S. 12, Court-fees Act. That section provides that every question relating to valuation for the purpose of determining the amount of any fee chargeable on a plaint shall be decided by the Court in which the plaint is presented, and shall be final as between parties to the suit. It has however been held in 23 Bom 486 (1), that though there is no appeal against a decision as to the correct valuation for any particular class of suits, still there is an appeal against a decision that any particular suit falls within a particular class. Here, though the suit is nominally one for accounts, still it is part of the case for the defendants that the suit is really one for an ascertained sum of money, falling under S. 7 (iv) (f), Court-fees Act. Thus clearly, even in the case of the defendants, there is a conflict between the plaintiffs and the defendants as to the class within which the suit falls. There is, therefore, an appeal available. The first question then is to decide the class in which this case falls. Nominally it is a suit for accounts. But the plaintiffs have issued a notice in which they claim a definite sum, and it is evidently the view of both the Courts below that this has the effect of the making the suit fall under S. 7 (i). In my opinion

1. Dada v. Nagesh, (1898) 23 Bom 486.

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the present case is a suit for accounts in spite of the plaintiffs having claimed a fixed sum by their notice. The written statement itself says that the defendant was ready to pay what might be found due on taking proper accounts; and in the notice to which reference has been made the plaintiffs say that according to their calculation the amount due from the defendants is a certain fixed sum, but ask the defendants to examine their own accounts and reply accordingly. I do not see how it would be possible to decide this case without going into accounts, and I regard it as really a suit for accounts.

The next question is whether, this being a suit for accounts, the plaintiffs are entitled to value it for the purposes of Court-fees as they like, or whether they are bound to give a value which is reasonably approximate to the correct value of the amount that they are likely to obtain, and to pay ad valorem Court-fees accordingly. In 36 All 500 (2) the plaintiff claimed two reliefs, one being a declaration and the other being an injunction. She valued the claim for a declaration at a very high figure and paid only a nominal Court-fee upon it, and she valued the claim for consequential relief at a very low figure and paid an ad valorem Court-fee upon it. It was held that as she had given a definite valuation upon the two reliefs which she claimed, she must pay Court-fees upon the combined reliefs and could not split them up in this way. I do not think that this case is any authority which will help towards the decision in the present case, where the plaintiffs have not claimed a multiplicity of reliefs; but it was cited because in the course of his judgment the learned Judge said that he had considerable doubt as to whether it was open to the plaintiff to put an arbitrary and fictitious valuation upon the reliefs which she sought. As, however, that question did not directly arise in the case, no decision was arrived at. In the present case it can hardly be said that the valuation put by the plaintiffs upon the relief claimed is even approximate. If there is any truth in the notice which they gave to the defendants, the value of the reliefs claimed must be in the neighbourhood of Rs. 1,600 or Rs. 1,700; and yet they have valued it at only Rs 200.

2. Jageshra v. Durga Prasad Singh, 1914 All 72 =24 I C 679=36 All 500=12 A L J 844.

Nevertheless I do not know of any clear authority to show that it is not open to them to do so if they wish. In 17 Bom L R 574 (3), it was held that in a case where the plaintiff had valued the suit for the purpose of jurisdiction at Rs. 3 lakhs, and the District Judge came to the conclusion that her share would be approximately Rs. 68,000, still the plaintiff was entitled to value it for the purpose of Court-fees at Rs. 130, as it was a suit for accounts. It was there stated that there did not appear to be any reason why the suit should not be treated as a suit for accounts and for the share which might be found due to the plaintiff upon taking of such account, and if it was a suit for an account falling under S. 7 (iv) (f), Court-fees Act, the plaintiff was at liberty to value it at Rs. 130 or any other sum she pleased. It seems to me that both the Courts below were wrong in refusing to allow the plaintiffs to value their suit as they pleased and in rejecting the plaint, because they had not valued it according to the orders of the learned trial Judge. According to S. 7 (iv) (f), Court-fees Act, it was open to the plaintiffs to value their plaint as they pleased, and their plaint as valued by them ought to have been accepted. The appeal is, therefore, allowed and the suit is ordered to be restored to the file to be heard according to law. The appellants will have their costs from the defendants in both the appeals and costs in the trial Court will be costs in the cause.

V.B./R.K. *Appeal allowed.*

3. Khatija v. Adam Husain, 1915 Bom 59=29 I C 949=39 Bom 545=17 Bom L R 574.

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BARLEE AND DIVATIA, JJ.

Manchersha Ardeshir Devierwala—Complainant—Applicant.

v.

Ismail Ibrahim Patel and *others*—Accused—Opposite Party.

Criminal Revn. Appln. No. 278 of 1935, Decided on 3rd December 1935, against order of Sessions Judge, Surat.

(a) Penal Code (1860), S. 421—'Property'—Right to cut trees to convert to charcoal is moveable property.

The right to cut trees under a contract to be converted into charcoal is moveable property: 13 *Bom L R* 874, *Rel. on.* [P 168 C 2 ;P 169 C 1]

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*** (b) Penal Code (1860), Ss. 421, 423—Moveable property of insolvent in foreign state vests in receiver and is available and distributable among creditors—Fraudulent disposition of same so as to prevent distribution among creditors is offence under S. 421.**

Moveable property in a foreign State belonging to the insolvent will ordinarily vest in the receiver in insolvency and the latter can take steps to recover it through the insolvent or otherwise so as to make it available and distributable among his creditors. It may be that in some cases he may not succeed in doing so, but the liability of the property being distributed among creditors does remain according to the law of British India, and if a dishonest or fraudulent transfer, removal or concealment or delivery of such property, is made by the insolvent without adequate consideration so as to prevent its distribution among his creditors according to law in British India, the offence under S. 421 would be established even if that property is in a foreign State: 1926 *Cal* 898 and 1932 *Cal* 310, *Rel. on.* [P 169 C 2]

(c) Penal Code (1860), S. 22—"Moveable property"—Definition is an inclusive one—It does not mean only corporeal property.

The definition in S. 22 of "moveable property" is an inclusive definition. It does not mean only corporeal property. It includes every description of property except immoveable property. [P 171 C 1]

(d) Penal Code (1860), S. 421—"Property."

The word "property" in S. 421 is wide enough to include a chose in action. [P 171 C 2]

C. H. Carden Noad and *U. L. Shah*—for Complainant.

G. N. Thakor and *B. G. Thakor*—for Accused.

I. B. Desai—for Opponent No. 3.

P. B. Shingne—for the Crown.

Divatia, J.—This revisional application is preferred by the original complainant against the order of discharge of the four accused who were charged with offences under Ss. 421, 423 and 109, I. P. C. The discharge order having been confirmed by the Sessions Judge, the complainant has come to this Court in revision.

His case in substance was that he and accused 1 and 2 were partners in the business of making charcoal out of wood. These two accused had obtained the right of cutting trees and making charcoal from wood in some villages in the Bansda State. The charcoal was to be brought to Bulsar in British India for sale. The complainant was the financing partner and after accounts between the parties were made up, these accused had in 1931 pledged some ready made charcoal to the complainant for Rupees 16,000 and had agreed to deliver it to him at Bulsar. As the accused failed to do so, the complainant had filed suits against the accused. One suit was filed in Thana Court in which one Ranchhodji accused 3, who alleged that some of the charcoal was pledged to him, was appointed a receiver by consent of the parties; this Ranchhodji, being afraid that his pledge may not be substantiated, instigated accused 1 and 2 to pass a sale-deed for a nominal sum to his joint nephew, accused 4, of their rights to cut trees under the agreement made with the Bansda State. It is alleged that this sale-deed of 13th November 1932 was passed with the intention of defrauding the petitioner who was a creditor of accused 1 and 2 for a large amount. Thereafter, the complainant applied for the adjudication of accused 1 and 2 as insolvents, and in the insolvency proceedings, accused 4 preferred his claim under the above-mentioned sale-deed. Therefore, the complainant filed the present complaint alleging that all the four accused had committed the offences of fraudulent removal of property to prevent its distribution among creditors under S. 421, I. P. C., and fraudulent execution of a deed of transfer containing a false statement under S. 423, I.P.C., and the abetment of these offences.

The trying Magistrate, without going into the merits of the case, held that the acts with which the accused were charged did not come under those two sections inasmuch as the right to cut trees which had been transferred under the said sale-deed could not be regarded as property, and, secondly, even if it was property, it was not property which could be lawfully distributed among creditors, being situated in the foreign State of Bansda, was not subject to the law of British India and could not be attached in Bansda State under British law, and hence the disposal of such property in a foreign State could not defeat or delay creditors. On these grounds, the accused were discharged by him. The learned Sessions Judge, who was approached in revision by the complainant, has held, and in our opinion rightly held, that the right of accused 1 and 2 under the agreement with the Bansda State to cut trees was property as decided in 13 Bom L R 874 (1), but he agreed with the Magis-

1. Alisaheb v. Mohidin, (1911) 13 Bom L R 874 =12 I C 375.

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trate that that property was not governed by the law in British India, that the receiver in insolvency could not touch the property in the foreign State which was governed by its own laws, and that it could not be said that it could be distributed in British India, and its transfer, therefore, could not be said to be fraudulent. Now, it seems to be clear on the authority of 13 Bom L R 874 (1) that the subject-matter of the deed of transfer by accused 1 and 2 to accused 4 is not only property but is also moveable property. That decision lays down that a contract for cutting of trees to be converted into charcoal is an agreement relating to moveable property.

The learned counsel for the opponents contends that the right of cutting trees was only a personal license, and therefore, not property which can be transferred, and he relies on some observations of the Sessions Judge that this was only a personal right, but the learned Judge himself has in another part of his judgment stated that the right is derived under a contract with the State, and there is nothing to show from the record that it was only a personal license. The document is not on the record. The only question that remains is whether it is property which was intended to be prevented from being distributed among creditors according to law. The trees are no doubt situated in Bansda State and the agreement between accused 1 and 2 and the Bansda State relating to the right of cutting trees took place in that State. The sale-deed transferring the right to accused 4 has been executed and registered in British India, the insolvency proceedings are in British India, and all the accused are also British Indian subjects. The lower Court has proceeded on the basis as to whether the British Court had any jurisdiction to annul a transfer of property in foreign jurisdiction and thereby to divest the transferee and to vest the property in the receiver in insolvency, and it replies in the negative on the ground that the foreign Court would not recognize such annulment with the result that the property could not be distributed among creditors in British India. But this view seems to us to be incorrect. According to the law of bankruptcy, which on this point is the same in England as in India, the law imposes on the bankrupt:

A personal obligation enforceable by the punitive process of the Court to do all acts necessary for completing the title of the trustee to all property situate outside the British dominions . . . . . By the rules of private international law, immoveable property can only be transferred in accordance with the *lex rei sitoe*; moveables, on the other hand, follow the person and, wherever situate, are bound by an adjudication in bankruptcy in the country where the bankrupt is domiciled, unless the particular law of the country where the property is situate specially prevents this.

Vide Halsbury's Laws of England, Edn. 2, Vol. 2, Para. 277, page 208; cf. Ss. 17 and 33, Presidency-towns Insolvency Act and Ss. 22 and 28, Provincial Insolvency Act. In two recent cases, the Calcutta High Court has summarised the law to the same effect, though the points actually decided in them were different from the point arising in the present case: 1926 Cal 898 (2) and 1932 Cal 310 (3). The position therefore is that moveable property in a foreign State belonging to the insolvent would ordinarily vest in the receiver in insolvency and the latter can take steps to recover it through the insolvent or otherwise so as to make it available and distributable among his creditors. It may be that in some cases he may not succeed in doing so, but the liability of the property being distributed among creditors does remain according to the law of British India, and if a dishonest or fraudulent transfer, removal or concealment or delivery of such property, is made by the insolvent without adequate consideration so as to prevent its distribution among his creditors according to our law, the offence under S. 421 would be established even if that property is in a foreign State. I think therefore that the lower Courts were wrong in holding that no offence was committed under that section and in discharging the accused. With regard to the offence under S. 423, the learned Sessions Judge says that there was no false recital in the deed of transfer as contemplated by that section, but in his judgment he has not discussed the evidence nor has he given any reasons for saying so. In the result the grounds of law on which the order of discharge is based cannot be sustained.

It has been urged by the learned counsel for the opponents that this Court

2. Yokohama Specie Bank Ltd. v. Curlender & Co., 1926 Cal 898=96 I C 459=43 C L J 436.
3. Sumermull Surena v. Bansilal, 1932 Cal 310 =137 I C 299=35 C W N 997.

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should not in any case interfere with the order of discharge as the dispute between the parties is a civil one and various legal proceedings are pending between them, one of which is a suit by the petitioner in the Bansda State Court in which the validity of this deed of transfer is in question. However the lower Courts have not gone into the merits of the case but have based their decision on the ground that the facts alleged by the complainant do not amount to an offence as British Indian Courts have no jurisdiction over the property. In this application, we have not got the evidence placed and discussed before us and we are therefore unable to say that the dispute is only of a civil nature. The rule is made absolute, the order of discharge is set aside and the case is sent back to the trial Court to be dealt with according to law.

Barlee, J.—I agree with the order proposed by my learned brother. This does not of course mean that the Magistrate is bound to frame a charge, for there are several points to be considered, which he has still to consider. He will have to record his findings on all the issues which arise in the case and then either frame a charge or discharge the accused. On the merits we agree with the learned Sessions Judge that the opponents' right under the contract with the Bansda State was "property." The principal question for us to decide is whether this right or the proceeds of its sale could have been distributed amongst the creditors in an insolvency, had it not been transferred by the accused. The learned Magistrate held in the negative because the right is property outside British India. The learned Sessions Judge agreed with him on the ground that the Insolveney Court cannot annul a transfer of property which is not within its territorial jurisdiction. It seems to us that he has missed the point, for it is an offence to make a transfer which cannot be annulled by an Insolvency Court. S. 28, Provincial Insolvency Act provides that the whole of the property of the insolvent shall vest in the Court or in a receiver and shall become divisible among the creditors.

It has been contended that this must be interpreted to include only the property of the insolvent which is within jurisdiction, on the ground that it must be presumed that the legislature does not intend to legislate in respect of property beyond jurisdiction. But this cannot be conceded; for the corresponding section of the Presidency-towns Insolvency Act, S. 17, provides that the property of the insolvent "wherever situate" shall vest in the Official Assignee, and it is therefore clear that the legislature does not consider that its jurisdiction is restricted to property within jurisdiction. The reason is that the insolvent himself is and must be subject to the jurisdiction of the Insolvency Court, since he must be a person who resides, or carries on business or works for gain within the local area in which the Court has jurisdiction; and he is therefore personally subject to the jurisdiction of the Court. This jurisdiction is similar to that claimed by the Court of Chancery over property both moveable and immoveable outside jurisdiction: 1 Ves Sen 444 (4).

The literature on this subject is scanty. We have been shown no case which is on all fours with the case with which we are dealing. In 33 Bom 462 (5), it was held that the property of an insolvent situate at Shanghai vested in the Official Receiver in Bombay. The question there was not whether the property had vested in the Official Receiver in Bombay, but how he might get control or possession; and the solution was that he could seek the assistance of the British Consul, who had jurisdiction over the insolvents. Two cases have been cited from an unauthorised report. In 1926 Cal 898 (2) the question was entirely different from that at present under consideration. Apparently Mogi & Co., a Japanese firm, was declared insolvent in Japan; and the Yokohama Bank obtained a dividend in Japan. In a contemporaneous or subsequent insolvency in Bombay, the Bank was a creditor and it was held that it was not bound to account for the dividend received out of jurisdiction, as that was not a part of the fund available for distribution among the creditors in Bombay. It is to be noticed that both the Bank and Mogi & Co. had a Japanese domicile. It was not argued that moveables in Japan would not have been a part of the fund available for the Indian

4. Penn v. Lord Baltimore, (1750) 1 Ves Sen 444.
5. Naoroji Sorabji Talati, In re, (1908) 33 Bom 462=10 Bom L R 965.

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creditors had they not been transferred; and it seems to have been assumed that they would have been available had the Yokohama Bank had an Indian domicile. The other case is 1932 Cal 310 (3), in which it was held merely that an Insolvency Court in Calcutta would not issue an injunction to restrain a creditor domiciled in Bikanir from suing in Bikanir to recover immoveables of an insolvent situate there. This merely means that the Bikanir creditor was not subject to the personal jurisdiction of the Calcutta Court.

The general result is that the property of an insolvent which is outside jurisdiction vests and can always be distributed, so long as it remains in the possession of the insolvent. In the two Calcutta cases the Courts were not concerned with this question, but with difficulties which had arisen owing to the fact that the property had been taken or was likely to be taken by third parties by due process of a foreign law; and with such questions we have no concern. Mr. Thakor has contended that the word "property" in S. 421 includes only corporeal property. He relied on S. 22 for the definition of "moveable property" and on the plain of Ch. 17 of the Code. In his view in none of the other sections of that Chapter, which relates to offences against property, can the word "property" be interpreted as anything but corporeal property. It is clear that in theft, robbery and receiving stolen property the property must be corporeal property, and very possibly the same can be said about "mischief." I am not so sure about "criminal breach of trust." But we do not think it necessary to consider the chapter section by section or to decide exactly whether the word "property" in other sections can only refer to corporeal property, for we are satisfied that there is no rule which restricts the meaning of the word in the section with which we are dealing. The definition in S. 22 of "movable property" is an inclusive definition. It informs us that "moveable property includes corporeal property of every description," but it dees not give us any information about incorporeal property. A wider definition is contained in the General Clauses Act, where "movable property" in defined in S. 3, Cl. (34), as property of every description except immoveable property. The word "property" in S. 421 is wide enough to include a chose in action, and it appears to us that we should give a wide interpretation to the word here since the act of dishonestly transferring a chose in action to defraud creditors is within the mischief of the section.

K.S./R.K. *Rule made absolute.*

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BEAUMONT, C. J. AND MACKLIN, J.

Lakshmichand Rajmal—Applicant.

v.

Gopikisan Balmukund — Opposite Party.

Criminal Revn. No. 285 of 1935, Decided on 8th November 1935, against order of Presidency Magistrate, 4th Court, Bombay.

Criminal P. C. (1898), S. 523—Police seizing property from person not shown to have committed offence—Magistrate should hold such person as being entitled to property—Remedy of other party claiming property is civil suit—Burden of proof is on such party to prove his title.

Under S. 523 what the Magistrate has to consider is, who is entitled to the possession of property which has been seized by the police. Where it is proved that the person from whose possession the property was seized came by it dishonestly, the Magistrate may have to consider questions of title in order to determine the best right to possession. But where it appears that the police have seized property from a person who is not shown to have committed any offence in relation to that property, then the Magistrate can only hold that that person is entitled to possession of the property. If another claims the property, his remedy is in a civil Court and the burden will be upon him to prove his title: 1933 *Mad* 434; 1927 *Cal* 532 and *Cr. Revn. Appln. No.* 65 *of* 1935, *Rel. on.* [P 172 C 1,2]

And such burden of proof will not be affected by the seizure by the police where no offence has been committed. [P 172 C 2]

R. B. Kantawalla—for Applicant.

A. G. Shaikh—for Opponent.

P. B. Shingne—for the Crown.

Beaumont, C. J.—In this case certain property was stolen from the complainant on 3rd January 1934, and it was found in possession of the present applicant on the next day. The police seized the property, and charged the applicant and his brother with stealing it. But on 22nd January the police made an application to the Magistrate that he should discharge the accused as there was no sufficient evidence to place them on a charge sheet. The police were of course well aware of the presumption that arises

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under S. 114, Evidence Act, that a man in possession of property shown to have been stolen soon after the theft is presumed either to have stolen it or to know that it had been stolen, and when the police applied for the discharge of the accused, it must have been because they were satisfied that that presumption could be rebutted. After the discharge of the accused, the question arose as to what was to be done with the property which the police had seized. Apparently this Court by an order made on 4th October 1934 directed the Magistrate to take action under S. 523 issuing a proclamation, specifying the articles in Court, and requiring any person who might have a claim thereto to appear before him and establish his claim. The Magistrate adopted that course, and the only claimants were the complainant and the present applicant. The Magistrate then held an inquiry, and he came to the conclusion that the complainant was entitled to the property. In so doing he relied on the presumption arising under S. 114, Evidence Act, that the applicant must have known that the property was stolen. It seems to me manifestly unfair to rely on that presumption against the applicant when the Magistrate had himself discharged the accused in respect of any offence in connection with this property.

Under S. 523 what the Magistrate has to consider is, who is entitled to the possession of property which has been seized by the police. Where it is proved that the person from whose possession the property was seized came by it dishonestly, the Magistrate may have to consider questions of title in order to determine the best right to possession. But where it appears that the police have seized property from a person who is not shown to have committed any offence in relation to that property, then in my opinion the Magistrate can only hold that that person is entitled to possession of the property. That is the rule which prevails in Madras, see 56 Mad 654 (1), and in Calcutta, see 54 Cal 283 (2), and this Court recently held that the same rule applies to a case arising under S. 517: vide Cri Rev Appln No. 65 of 1935 (3). If the complainant considers that the applicant has no title to the property, he has a remedy in a civil Court, but the burden will be upon him to prove his title. If however the property is handed over to the complainant, the burden would be upon the applicant to prove his title in a civil Court. I can see no reason why the burden of proof in a civil suit should be affected by the seizure by the police of property in relation to which no offence is proved. Application allowed and property directed to be returned to the petitioner.

Macklin, J.—I agree.

K.S./R.K. *Application allowed.*

1. Karuppannan v. Guruswami, 1933 Mad 434 =143 I C 755=64 M L J 576=56 Mad 654.
2. Sattar Ali v. Afzal Mahomed, 1927 Cal 532= 102 I C 482=28 Cr L J 546=54 Cal 283.
3. Dhanmall Chellaram v. Kasturchand Krishnaji, Cri Revn Appln No. 65 of 1935, decided on 2nd August 1935 by Beaumont, C. J. and N. J. Wadia, J.

* A. I. R. 1936 Bombay 172

BARLEE AND DIVATIA, JJ.

Emperor.

v.

Bhawan Surji—Accused 1.

Criminal Ref. No. 137 of 1935, Decided on 26th November 1935, from order of Addl. Dist. Magistrate, Broach and Panch Mahals.

*** Penal Code (1860), Ss. 378 and 425 — Stealing calf and subsequently killing it are two distinct offences of theft and mischief— Separate conviction and separate sentence for each offence is correct.**

Stealing a calf and subsequently killing it are two distinct offences and constitute two different acts falling within the definitions of theft as well as of mischief, and separate conviction and separate sentence is quite legal: 5 *Bom L R* 460 ; 1925 *Pat* 34 and 6 *W R Cr* 5, *Dissent.*; *Case law reviewed.*

[P 173 C 1; P 174 C 1, 2]

P. B. Shingne—for the Crown.

Divatia, J.—This is a reference made by the Additional District Magistrate, Broach and Panch Mahals, recommending that the conviction of accused 1 of the offence of mischief under S. 429, I. P. C., be quashed, and that the fine imposed in respect of this offence be remitted. The accused had been charged with the offences of stealing the calf of the complainant, and of committing mischief by subsequently killing it. The learned Magistrate who tried the case found that the accused stole the calf and thereafter killed it, and he convicted him of the offence of theft as well as of mischief under Ss. 379 and 429, I. P. C., and sen-

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tenced him to pay a fine of Rs. 25 for each of the offences, and in default to suffer rigorous imprisonment for a month for each offence. The other accused were convicted of the offence of assisting in the disposal of stolen property under S. 414, I. P. C. The learned Additional District Magistrate has made this reference because it has been held by this Court in 5 Bom L R 460 (1) that a person who stole a fowl and then killed it could not be punished separately for the offence of theft as well as of mischief, and he has recommended that the conviction of accused 1 of the offence of mischief was therefore illegal and should be set aside.

The question is as to whether the separate conviction and sentence for the offence of mischief is correct. It is true that the point is covered by the decision relied on by the District Magistrate, but we are disposed to think, after going through the relevant section as well as the authorities bearing on this point and after hearing the learned Government Pleader, that the view which has been taken in 5 Bom L R 460 (1) is not correct and that, at any rate, that decision has ceased to have force after S. 35, Criminal P. C., was amended in 1923 by deleting the word "distinct" between the words "two or more" and "offences." In the above case, no reasons are given for holding that a person who was convicted for stealing a fowl and then killing it could not be convicted separately for theft and mischief. The learned Judges relied on the reasons given by the District Magistrate, viz. "In 6 W R Cr 5 (2) it was held that a double sentence for theft and mischief is illegal and improper." Now, looking to that decision we find that no reasons are also given in that case. It is said that a double sentence for theft and mischief is illegal and improper and the sentence as part and parcel of the conviction must be set aside. It appears that there are two previous rulings of this Court which though not reported in any authorised series have been printed in Ratanlal's Unreported Criminal Cases. The first of the rulings, which is printed at p. 129, of that book Rat Un Cr C 129 (3), says that a person who stole a bullock and then killed it can only be convicted of theft and not of mischief also. Here again no reasons are given in the order.

It is only stated that the prisoner ought not to have been convicted of mischief in respect of the bullock which he had been convicted of stealing. The Sessions Judge who made the reference in that case was of the opinion that the act of killing the bullock after the accused person had acquired possession of it, though unlawfully, did not constitute an offence punishable after the offender was convicted and punished for the theft. In the second case, which is printed at p. 430 Rat Un Cr C 430 (4), of that book, a contrary view has been taken by another Bench of this Court. There the accused were charged with the offence of stealing a bullock as well as committing mischief and the trying Magistrate convicted them of both the offences. The District Magistrate made a reference to this Court, being of the opinion that the conviction for the offence of mischief was not justified by law because it was doubtful whether, after a theft was committed, it was possible to commit the offence of mischief in respect of the stolen property as the loss had already been inflicted on the owner by the theft, and it was rather a straining of the law to hold that the destruction of the stolen property was a second offence. This Court however did not accept that view and held that the separate convictions and sentences were not illegal, that the theft preceded the mischief, and that the two acts of theft and mischief were separate ; that the stolen property was not transferred by the theft and the prisoners were rightly punished by separate sentences for the fresh act of mischief. None of these two cases have been noticed in the case in 5 Bom L R 460 (1), which is decided upon the view taken in 6 W R Cr 5 (2).

As there has been no appearance on behalf of the accused in this case, the learned Government Pleader has very fairly invited our attention to the case of 3 Pat 804 (5), which has taken the same

1. Emperor v. Ramla Ratanji, (1903) 5 Bom L R 460.
2. Bichuk Aheer v. Auhuck Bhooneea, (1866) 6 W R Cr 5.
3. Queen-Empress v. Genya, (1877) Rat Un Cr C 129.
4. Queen-Empress v. Krishna, (1889) Rat Un Cr C 430.
5. Husain Buksh v. Emperor, 1925 Pat 34=84 I C 341=26 Cr L J 277=3 Pat 804=7 P L T 36.

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view which has been taken in 5 Bom L R 460 (1), viz. that where a person who steals an animal kills it for the purpose of eating it, he cannot be convicted of the offences of theft and mischief. In this case reliance has been placed upon 5 Bom L R 460 (1), as well as the decisions in the case of 1 Weir 497 (6) and 6 W R Cr 5 (2), and the learned Judge says that there can be no doubt that where theft of an animal has been committed, the killing of it afterwards by the person who stole it for the purpose of eating it cannot add another offence. These are all the reported rulings on this point brought to our notice. It appears to us that the view taken in 5 Bom L R 460 (1) as well as in 3 Pat 804 (5) is erroneous, and that the correct view would be that these two offences are distinct offences and constitute two different acts falling within the definitions of theft as well as of mischief. For the offence of theft what is necessary is "the dishonest removal of moveable property out of the possession of any person without his consent," and the essence of the offence of mischief is the wrongful destruction or dimunition in the value of any property so as to cause loss or damage to any person.

It is true that the element of dishonesty, that is to say, the causing of wrongful loss or wrongful gain to some person, is a common element in both these offences. But it cannot be said that simply because the accused has caused wrongful loss to another person by taking away his property without his consent, the subsequent act of destruction of that property would not be an offence because the wrongful loss is already caused by taking it away from its possessor. Wrongful loss to a person can be caused in a variety of ways. Wrongful loss to a person whose property is stolen may be a temporary loss so long as he is kept out of its possession without his consent, while the wrongful loss to a person whose property is destroyed is a permanent loss. The nature of the loss in both cases is different and falls under the definitions of distinct offences. It is therefore possible to commit the offence of mischief in respect of the stolen property even though some loss has already been caused to its possessor by the offence of theft. The explanations to S. 425 says that the offence of mischief may be committed with regard to any property and against a person who may not be the owner of the property and it may be committed with regard to the offender's own property. This would show that the essence of the offence of mischief consists in the wrongful destruction or diminution in value of the property, whether it is one's own, or somebody else's. It seems to me therefore on the wording of Ss. 378 and 425, I. P. C., that these two acts are distinct offences and that the intention ot cause wrongful loss by the destruction of property is different from the intention to cause wrongful loss by its mere removal from a person's possession.

It may be noted that Ss. 428 and 429 deal with certain aggravated forms of mischief one of which is killing certain animals and are made punishable with a higher sentence. Thus killing an animal in certain cases is made a distinct offence. A man may thus simply kill an animal without stealing it and if his case falls under the definition of mischief, he would be guilty of the offence of aggravated form of mischief in certain cases, or he may at first intend to steal it and thereafter intend to kill it, in which case there is no reason why the two acts which are both recognised as distinct offences should not be punished as such. Even if the animal is stolen with the intention of subsequently killing it and thereafter it is killed, the legal position would not be different. It may also be noted that the present S. 35, Criminal P. C., does not contain the words "distinct" which the previous S. 35 did. It says :

> When a person is convicted at one trial of two or more offences, the Court may.........sentence him, for such offences, &c.........

It is not necessary now, in order to give separate punishments, that the two offences should be distinct, and a man can be convicted of and separately punished for any two offences, subject to the provisions of S. 71, I. P. C. In the present case, not only are these two offences distinct, but both of them are covered by two separate definitions and are committed at different times. I therefore think that the trying Magistrate was right in holding that the accused was guilty of both the offences. That being

6. In re, Madar Saheb, (1902) 1 Weir 497.

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so, it is not necessary to pass any order on this reference, and the papers should be sent back to the District Magistrate.

Barlee, J.—I agree with the order proposed by my learned brother. The case has been sent to us by the learned District Magistrate because of the decision in 5 Bom L R 460 (1). That decision was that a person who steals a fowl and then kills it cannot be punished separately for the offences of theft and mischief. No reasons are given in the judgment for this view, and in view of the amendment of S. 35, Criminal P. C., which has been pointed out by the learned Government Pleader, it is no longer binding on us. The question we have to decide is whether after the wrongful loss was caused to the owner of the calf by the theft any further wrongful loss was caused to him by the killing of the animal. On this point different Courts have taken different views and no clear and considered ruling has been cited. In my view the wrongful loss which was caused to the owner by the removal of the animal was different from the wrongful loss which was caused to him by its destruction. By the theft he was deprived temporarily of the animal, and when it was killed the deprivation was made permanent. I agree then with my learned brother that the accused has committed two distinct offences and he was rightly convicted both under Ss. 379 and 429, I. P. C.

K.S./R.K. *Reference answered.*

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BEAUMONT, C. J. AND N. J. WADIA, J.

Pitambar Khemji Gujar and *others*—Appellants.

v.

Rajaram Shahajirao Surbarao Mahamunkar—Respondent.

Letters Patent Appeal No. 16 of 1934, Decided on 9th August 1935, against decision of Divatia, J., in S. A. No. 910 of 1930.

* **(a) Mortgage—Sale of equity of redemption for less than Rs. 100 does not require registration.**

A sale of the equity of redemption for less than Rs. 100 prima facie does not pass an interest in immoveable property of the value of Rs. 100 or upwards, and does not therefore require registration under S. 17 (1) (b), Registration Act: 16 *P R* 1892 (*F B*), *Foll.*; 1928 *Cal* 107, *not Foll.* [P 175 C 2]

(b) Acquiescence—Mortgage of shares of two brothers by one of them having power to do so—Sale of equity of redemption by mortgagor—Other brother keeping quiet for over 50 years is not entitled to challenge sale.

Where one of two brothers mortgaged the shares of both the brothers, and it was not disputed by the other but subsequently the equity of redemption was sold by him and the other brother kept quiet for over 50 years:

Held: he was not entitled to challenge the sale of the equity of redemption by contending that it was not binding on his share: 1924 *Bom* 417, *Rel. on.* [P 176 C 1,2]

V. B. Virkar—for Appellants.

Beaumont, C. J.—This is an appeal under the Letters Patent from a decision of Divatia, J. The plaintiff had sued to redeem a mortgage under S. 15-D, Dekkhan Agriculturists' Relief Act. The mortgage was made in 1875 by the plaintiff's brother to the predecessor-in-title of the defendants. The plaintiff's brother executed the mortgage as the manager of the joint family, and as the plaintiff was suing to redeem the mortgage, he necessarily admitted the validity of the mortgage which indeed he could not have challenged in a suit under S. 15-D, Dekkhan Agriculturists' Relief Act. Then in 1877, two years after the mortgage, the plaintiff's brother sold the equity of redemption to the mortgagee for Rs. 20. The trial Judge held that, there being no evidence that that sale was for legal necessity, the plaintiff was not bound by it and the sale only affected the half share of the plaintiff's brother in the equity of redemption. In appeal the learned Judge differed from that portion of the decision and held that the sale comprised the whole interest in the equity of redemption.

In second appeal Divatia, J., held that the conveyance of the equity of redemption required registration, and not having been registered could not be given in evidence, and therefore the mortgage was a subsisting mortgage. I am unable to agree with that view of the learned Judge. The sale of the equity of redemption being for less than Rs. 100, prima facie the document does not pass an interest in immoveable property of the value of Rs. 100 or upwards, and does not therefore require registration under S. 17 (1) (b), Registration Act. But the learned Judge held that the effect of the conveyance was to extinguish the mortgage which was for more than Rs. 100, and therefore the conveyance of the equity of redemption amounted to

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the extinguishment of an interest in immoveable property of a greater value than Rs. 100. In my opinion that view involves some misconception. The rights of the mortgagee were not extinguished or released by the conveyance of the equity of redemption; they were merely enlarged. Prior to the conveyance of the equity of redemption the mortgagee was the legal owner with a right to possession, but he was liable to be redeemed. After the conveyance of the equity of redemption he remained the legal owner with a right to possession, but free from the liability to be redeemed. That is to say, his interest was enlarged from a defeasible to an indefeasible interest. The learned Judge refused to follow a decision of the Punjab Chief Court in 16 P R 1892 (1), which is referred to in the latest edition of Sir Dinshah Mulla's book on the Indian Registration Act, Edn. 3, at p. 47, and he followed a decision of the Calcutta High Court in 46 C L J 573 (2). The Calcutta Court seems to have held that a conveyance of the equity of redemption which included a release of the mortgagor's liability under the mortgage required registration because the mortgage debt was for more than Rs. 100, though the consideration for the conveyance was less than Rs. 100. I do not follow how a release of the personal liability of the mortgagor can be held to be an extinguishment of any interest in an immoveable property; it seems to me to be merely an extinguishment of a personal liability. In my opinion, the view taken by the learned Judge in second appeal was wrong and the document did not require registration and can be given in evidence.

Then the next question is one on which the trial Court and the appellate Court differed, viz. as to whether the equity of redemption covered more than the half share of the plaintiff. As I have pointed out, it is clear that the plaintiff had acknowledged the right of his brother to create the mortgage. There is no evidence as to whether the plaintiff was aware of the sale of the equity of redemption in 1877. If he was not, he would no doubt be entitled to challenge the sale though not in a suit under the Dekhan

1. Pir Bakhsh v. Mangal, (1892) 16 P R 1892 (F B).
2. Barsik Nandi Mandal v. Gurudas Pal, 1928 Cal 107=107 I C 474=46 C L J 573.

Agriculturists' Relief Act, but I think that at this distance of time, the plaintiff having waited 50 years before bringing this suit, we cannot assume in his favour that he had no knowledge of the conveyance of the equity of redemption. That view is supported by a decision of this Court in 26 Bom L R 341 (3).

In my opinion the decision of the lower appellate Court was right and this appeal must be allowed and the plaintiff's suit dismissed with costs throughout. Appeal allowed with costs.

N. J. Wadia, J.—I agree.

K.S./R.K. *Appeal allowed.*

3. Krishnaji v. Sadanand, 1924 Bom 417=80 I C 763=26 Bom L R 341.

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MACKLIN, J.

Isamoddin Ajmoddin and *others*—Appellants.

v.

Ajmoddin Shamsoddin—Respondent.

Second Appeal No. 594 of 1933, Decided on 11th September 1935, against decision of Asst. Judge, Sholapur, in Misc. Appeal No. 5 of 1932.

*** Insolvency—Fraudulent transfers—Setting aside, of—S. 53, Provincial Insolvency Act, includes transfer by decree—Nominal transferor being transferee from insolvent —S. 53 applies if it is proved that real transferor is insolvent.**

S. 53, Provincial Insolvency Act, refers to "any" transfer and these words include a transfer made by a decree on an award. S. 53 does not provide for transfers by a transferee, but the words of S. 53 are wide enough to include the real transferor as distinct from the nominal transferor. So a transfer made by a nominal transferee from an insolvent can be set aside under S. 53 if it is proved that the real transferor behind the transfer was the insolvent himself and both the transactions form part of the same transaction. [P 177 C 1, 2]

G. B. Chitale—for Appellants.
D. A. Tulzapurkar—for Respondent.

Judgment.—This second appeal arises out of an application by the receiver appointed in an insolvency petition, under S. 53, of the Provincial Insolvency Act, to have two transfers set aside by the Court. The insolvency was declared on 31st January 1931. But in the previous March there was an award in a partition suit between the insolvent and his brother and sister, and the award, dated 3rd March 1930, was embodied in the decree, dated 5th March 1930. Under

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that award decree some of the insolvent's property passed to his brother and sister. Two days after the decree the sister, who is now opponent No. 1, transferred what she obtained under the decree to the sons of the insolvent, opponents Nos. 2, 3 and 4. The receiver asks that the transfer represented by the decree may be set aside on the ground that the award was fraudulent, and he also asks that the transfer by the sister two days after the decree may also be set aside as fraudulent. In both cases he seeks the aid of S. 53, Provincial Insolvency Act. It is found as a fact that the transfers were fraudulent, and I have no reason to disagree with that conclusion, as fraud is apparent on the face of the award. But it is contended in this appeal that S. 53, Provincial Insolvency Act, cannot be applied to either of the transfers. That section runs as follows:

> Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court.

It is argued in the first place that the section refers to "transfers" and not to "decrees," and therefore, if a decree has been passed, the only remedy would be not by S. 53 but by a suit to have the decree set aside. No authority has been quoted for this argument, and, in my opinion, it is unsound. The section refers to "any" transfer, and I do not know why these words should not include a transfer made by a decree. In this case of course the transfer could not be annulled without in effect annulling the decree. But there does not seem to be any reason for not thinking that S. 53 would allow annulment of the decree in such circumstances. The next point taken is that S. 53 deals only with transfers by the insolvent himself and does not permit annulment of transfers made by a transferee of the insolvent. I agree that the section does not provide for transfers by a transferee. But in the peculiar circumstances of this case it is clear that the real transferor behind the transfer, nominally made by the insolvent's sister, was the insolvent himself. The award was dated 3rd March. It was followed by a decree on 5th March, and within two days one of the persons who received the property from the insolvent gave it back to the insolvent's own children. It is obvious that the transfer to the sister by the award and the transfer by the sister to the insolvent's children were intended to be part of one transaction, and it is inconceivable that the insolvent himself was not behind the second transfer. In my opinion the words of S. 53 are wide enough to include the real transferor as distinct from the nominal transferor. Thus the second transfer also can be set aside under S. 53. On both grounds the appeal fails and is dismissed with costs.

B.D./R.K. *Appeal dismissed.*

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BROOMFIELD AND MACKLIN, JJ.

Tukaram Rangrao Patil— Plaintiff — Appellant.

v.

Subhedar Nanaji Patil and *others*— Defendants—Respondents.

Letters Patent Appeal No. 18 of 1934, Decided on 4th September 1935, against decision of N. J. Wadia, J., in S. A. No. 991 of 1929.

Mortgagor and Mortgagee — Equity of redemption, purchase of, by mortgagee in money decree does not put an end to relation of mortgagor and mortgagee — Mortgagor in order to redeem must set aside sale.

The purchase of the equity of redemption by the mortgagee does not ipso facto put an end to the relation of mortgagor and mortgagee. The sale to the mortgagee is not a nullity and the mortgagor is bound to follow the procedure allowed by the law to get the sale set aside. Otherwise his right to redeem is barred: 14 *Bom L R* 254; 32 *Cal* 296 (*P C*); 35 *Cal* 61 (*F B*); 1926 *Bom* 303; *S. A. No.* 474 *of* 1909; 1915 *All* 70 and 1920 *Cal* 363 (*F B*), *Foll.*; 22 *Bom* 624, *not Foll.* [P 181 C 1]

G. N. Thakor and *V. D. Limaye*—for Appellant.

N. N. Majumdar—for Respondents 1 to 10, 12 and 13.

Judgment in S. A. No. 991 *of* 1929.

N. J. Wadia, J.—This is an appeal against a decree of the District Judge of Sholapur confirming a decree of the Second Class Subordinate Judge of Madha dismissing the plaintiff's suit. The plaintiff (appellant) brought a suit for redemption of certain property which had been mortgaged by his father in 1871 to the father of defendant 1. In 1873 the mortgagee had obtained a decree against the mortgagor for arrears of rent of the mortgaged property, and in execu-

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tion purchased the mortgagor's equity of redemption. He then obtained possession of the mortgaged property. It was contended by the defendants (respondents) that by the purchase of the mortgaged property by the mortgagee in 1873 in the Court-sale the mortgagor's equity of redemption had been completely extinguished. Both the lower Courts have upheld this contention and have on that ground dismissed the suit.

In support of his contention that the mortgagor's right to redeem still subsists the plaintiff (appellant) has relied on the decision in 22 Bom 624 (1). Both the lower Courts have held that that decision is no longer good law. In 22 Bom 624 (1), the plaintiff had sued to redeem certain properties which his grandfather had mortgaged in 1875. In 1878 the mortgagee had sued the mortgagor and had obtained a money decree against him in respect of other debts and in execution had attached the mortgaged properties and had purchased them in the names of his servants in Court-sales without obtaining the leave of the Court to bid. The questions which arose for consideration in that case were whether the plaintiff was debarred, by the sales in execution, from redeeming, and whether he could redeem without having had the sales set aside in execution proceedings. Farran, C. J., said (p. 629):

> The question is one of much difficulty and doubt, but seeing that the legislature has now adopted the principle in its widest aspect we think that we are justified in acting upon it. In this view the sale is rendered nugatory, not by the provisions of S. 294 of the Code (though permission granted under that section to bid might have validated the purchase), but by the impossibility of a mortgagee by such sales and purchases as these freeing himself from his liability to be redeemed. In this view, the fact that Dhondo did not take proceedings under S. 294 to set aside the sales does not affect his present right to redeem.

In 32 I A 23 (2), the question was whether a suit for redemption was barred by adverse possession for more than 12 years by the purchasers at execution sales of the equity of redemption. In the course of the judgment it was stated (p. 37):

> Their Lordships throw no doubt on the principle, which has been acted on in many cases in India, that a mortgagee cannot, by obtaining money decree for the mortgage debt and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage.

After making some remarks with regard to the facts of the particular case they said (p. 37):

> In any case the point taken by the appellate Judge would not be a cause of nullity for want of jurisdiction, but a case of irregularity in procedure only.

The view taken in 22 Bom 624 (1), was that the purchase of the equity of redemption by the mortgagee in such a case would be a nullity. The Privy Council in 32 I A 23 (2), laid down that the sale in such a case would amount only to an irregularity and would be voidable, and that the mortgagee by such a sale would not acquire an irredeemable title.

In 35 Cal 61 (3), two questions were referred to a Full Bench: first, whether when a sale has been held in contravention of the provisions of S. 99, T. P. Act, the sale is a nullity or an irregular and voidable sale; and, secondly, whether the right of redemption of the mortgagor is or is not affected by such sale. It was held by the Full Bench that a sale held in contravention of the provisions of S. 99, T. P. Act, is not a nullity, but an irregular and voidable sale, and that such a sale can be avoided before confirmation of sale by an application under S. 244, Civil P. C., without its being necessary for the applicant to show more than that the provisions of the Transfer of Property Act have been contravened. But after confirmation, the sale can only be avoided by an application under Section 244, provided that the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale proceedings preliminary to sale. The Full Bench thought that it was neither necessary nor advisable to answer the second question, viz., whether the right of redemption of the mortgagor is or is not affected by such sale. Mookerji, J., in discussing the third class of cases pertaining to this question referred to the case of 22 Bom 624 (1), as one of the cases in which it had been ruled that a sale held in contravention of the provisions of S. 99, T. P. Act, was not a nullity and that, though voidable, yet even if it is not formally annulled, it does not

1. Martand v. Dhondo, (1898) 22 Bom 624.
2. Khirajmal v. Daim, (1904) 32 Cal 296=32 I A 23=9 C W N 201 (P C).
3. Ashutosh Sikdar v. Behari Lal, (1908) 35 Cal 61=6 C L J 320=11 C W N 1011 (F B).

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affect the right of redemption of the mortgagor. He said (p. 79):

The third class of cases, to which reference has been made, affirms the doctrine that a sale held contrary to the principle embodied in S. 99 is not a nullity, and if the mortgagee purchases at such a sale, he does not acquire an irredeemable title. The leading decision on the point is that of the Judicial Committee in 32 I A 23 (2). There the mortgagees obtained a decree for money against the mortgagors upon a claim independent of the mortgage; they executed the decree, and purchased the equity of redemption. The mortgagors then sued to redeem the mortgagees upon the footing that the sale was a nullity. Their Lordships ruled that the sale could not be treated as a nullity, but that the mortgagees had not acquired an irredeemable title. They accordingly allowed the mortgagors to redeem upon payment of what was due upon the mortgage and what had been paid by the mortgagees at the execution sale for the purchase of the equity of redemption. If the sale is merely voidable, and, therefore, stands good till avoided by the appropriate procedure, it is not easy to perceive how the mortgagor can exercise his right of redemption, till the sale has been set aside, and this view has in fact been affirmed in 2 A L J 123 (4); but although there may be room for controversy whether the view is strictly logical, it may be observed that it leads to substantial justice, and gives precisely the same result, as would be attained by a reversal of the sale in the first instance, and redemption thereafter; if the sale is set aside upon a proper application made, the mortgagee-purchaser gets back the money paid at the execution sale, and the mortgagor is left free to redeem the security. According to the view taken by the Judicial Committee, the mortgagor gets back the property upon payment of precisely the same sum. The result is exactly the same, but the procedure is different; in the former case, there is a successful application to set aside the sale, followed by a suit on the mortgage in which the mortgagor gets an opportunity to redeem; in the latter case, there is a suit for redemption in which the rights of the parties are worked out. It is not necessary for our present purposes to pursue this line of enquiry further, which can properly arise only in a suit for redemption. . . .

The question how the mortgagor could exercise his right of redemption in the case of such a sale was not dealt with in 35 Cal 61 (3). This question arose in 14 Bom L R 254 (5). In that case five survey numbers, 68, 71, 75, 76 and 77, were mortgaged by the plaintiff's predecessors to the defendants' predecessors in 1873. In 1876 the mortgagee obtained a decree against the mortgagor on account of arrears of interest. In execution of the decree, two lands (survey Nos. 68 to 75) were put up for sale and purchased by the mortgagee in 1877. About the same time the three other lands (survey Nos. 71, 76 and 77) were put up for sale and purchased by a stranger B who had obtained possession. In 1879 B sold the survey numbers to the mortgagee, who remained in possession of all the survey numbers after that date. In 1907 the plaintiffs sued to redeem all the five survey numbers. It was held that as regards survey Nos. 68 and 75, the only remedy which the plaintiffs had was in the first instance to get the sale set aside in proceedings in execution under S. 244, Civil P. C.; and that having failed to do so, they could not maintain their suit for redemption, because the sale was not void but only voidable. With regard to the other three lands (survey Nos. 71, 76 and 77), it was held that they passed into the possession of a stranger to the decree whose sale was confirmed and who obtained possession and enjoyed it for two years; and that the mortgagee who subsequently purchased from him was entitled to rely on the title of his vendor. It was held in this case that the ruling in 22 Bom 624 (1), had no application to the case of a purchase by a stranger.

Both the lower Courts have held that by reason of the decision in 14 Bom L R 254 (5), the view taken in 22 Bom 624 (1), is no longer good law. This view appears to me to be correct. The view taken in 22 Bom 624 (1), was that the plaintiff in such a case might redeem although he had not taken proceedings under S. 294 (i. e., O. 21, R. 72) to have the sale set aside. If this principle had been applied in 14 Bom L R 254 (5), the plaintiffs would have been entitled to redeem the two survey numbers 68 and 75 which the mortgagee had himself purchased; but it was held in that case that the only remedy which the plaintiffs had was in the first instance to get the sale set aside under proceedings taken in execution under S. 47, Civil P. C., and as they had failed to do this, they could not maintain a suit for redemption. It is admitted by Mr. Thakor for the appellant that the decision in 14 Bom L R 254 (5), is clearly against the principle laid down in 22 Bom 624 (1). He argues, however, that in the former case the attention of the Court had not been drawn to this point, and that therefore it could

4. Madan v. Jamna, (1898) 2 A L J 123.
5. Sahadu Manaji v. Devlya Jaba, (1911) 14 Bom L R 254=14 I C 780.

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not be held that the view taken in 22 Bom 624 (1), had been deliberately dissented from. I find it difficult to accept this contention. In 14 Bom L R 254 (5), the trial Court had allowed redemption of these two survey numbers, viz. 68 and 75, and had based its decision on the authority of 22 Bom 624 (1). The learned District Judge in appeal reversed the decision and in doing so again discussed 22 Bom 624 (1). The High Court in their judgment referred to 22 Bom 624 (1), and said that with regard to survey numbers 68 and 75 they were of opinion that the decision of the learned District Judge was correct.

They then referred to the observations of the Judicial Committee in 32 I A 23 (2), and to the judgment of the Calcutta High Court in 35 Cal 61 (3), and after considering the effect of these decisions held as stated above. It is clear therefore that the view taken in 22 Bom 624 (1), was deliberately not accepted in 14 Bom L R 254 (5), and it was held that in a case in which the mortgagor sought to redeem the property of which the mortgagee had purchased the equity of redemption in a Court-sale held in execution of a decree obtained by him for interest due on the mortgaged property, the remedy of the mortgagor was first to get the sale set aside, and that if he failed to do so he could not redeem. The view taken by both the trial Court and the lower appellate Court appears to me to be therefore correct. In 28 Bom L R 588 (6), it was held that where the equity of redemption in one of the mortgaged properties was purchased by the mortgagee, it was open to the mortgagor to redeem the remaining properties only. Macleod, C. J., remarked in the course of his judgment that (p. 589):

the respondent's pleader rightly admitted that the decision in 32 I A 23 (2), governs the case, and the case of 22 Bom 624 (1), cannot now be considered as an authority, as was pointed out in S. A. No 474 of 1909 (7), in this Court.

In 47 Cal 377 (8), it was held by a Full Bench of the Calcutta High Court that where a mortgagee has in contravention of S. 99, Transfer of Property Act, attached the mortgaged property and brought it to sale and purchased it himself, the mortgagor or his transferee cannot successfully maintain a suit for redemption of the property without first getting the sale set aside. In that case the question referred to the Full Bench was:

Where a mortgagee has, in contravention of S. 99, Transfer of Property Act, attached the mortgaged property and brought it to sale and purchased it himself, can the mortgagor or his transferee, without first getting the sale set aside, successfully maintain a suit for redemption of the property?

After dicussing the question referred to the Full Bench in the light of the decision in 35 Cal 61 (3), and after stating that the question referred to the Full Bench should be answered in the negative, Sanderson, C. J., remarked (p. 397):

This conclusion does not, in my judgment, conflict with the principle laid down in the dictum of Lord Davey in 32 I A 23 (2), viz. 'Their Lordships throw no doubt on the principle, which has been acted on in many cases in India, that a mortgagee cannot, by obtaining a money decree for the mortgage debt and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage.' The mortgagor's right in this respect is provided for in S. 99, T. P. Act, 1882, but inasmuch as it has been decided by the Full Bench of this Court that a sale, though held in contravention of S. 99, is not a nullity, but is an irregular and voidable sale liable to be set aside merely on proof that the terms of the section have been contravened, it follows that, under the circumstances mentioned in the question referred to the Full Bench, the mortgagor, in order to establish and enforce his right of redemption, and to have accounts taken as between the mortgagor and mortgagee, must get the sale set aside in accordance with the procedure and within the time prescribed, before he can sue for redemption.

The view taken was the same which had been taken by this Court in 14 Bom L R 254 (5). On these grounds I hold that the view taken by the lower appellate Court is correct. The appeal is dismissed with costs.

(The Letters Patent appeal having come for hearing before the Bench, the following judgment was delivered.)

Broomfield, J. — This is a Letters Patent appeal from the judgment of N. J. Wadia, J., confirming the decree of the lower Courts dismissing the plaintiff-appellant's suit for redemption. The material facts may be very briefly stated. The property in suit was mortgaged in July 1871, by the father of the plaintiff to the father of the defendant. At the

6. Sidheshvar v. Ganpatrao, 1926 Bom 303=96 I C 361=50 Bom 331=28 Bom L R 588.
7. Govindrao v. Waman, S. A. No. 474 of 1909.
8. Uttam Chandra v. Rajkrishna Dalal, 1920 Cal 363=55 I C 157=47 Cal 377=31 C L J 98=24 C W N 229 (F B).

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same time the father of the plaintiff executed a rent-note in favour of the mortgagee and remained in possession. He failed to pay the rent and the mortgagee filed a suit to recover it, and obtained a decree, in execution of which he brought the mortgaged property to sale. At the Court sale he purchased it himself. The available records of this suit do not enable us to say whether this purchase was or was not with the permission of the Court. The question for decision is whether under these circumstances the mortgagor is entitled to redeem. The case-law has been very fully considered in the judgment of N. J. Wadia. J., and as we are in agreement with him we do not think it necessary to discuss the cases in great detail.

There is one case in the appellant's favour, 22 Bom 624 (1). At any rate it is in the appellant's favour on the assumption that the mortgagee purchased without the Court's permission. In 22 Bom 624 (1), it was admitted that the Court's permission had not been obtained. But Sir Charles Farran in his judgment indicated the view that if the permission had been granted it might have validated the sale. On the facts of that case it was held that the purchase by the mortgagee did not affect the mortgagor's right to redeem, and that his right to redeem was not barred by his failure to take steps under the Civil Procedure Code to set the sale aside. But the later decisions of this High Court, while maintaining the principle adopted in 22 Bom 624 (1), (that

a mortgagee is not entitled by means of a money decree obtained on a collateral security to obtain a sale of the equity of redemption, because by so doing he deprives the mortgagor of the privilege which a Court of equity always accords to a mortgagor, viz. a fair allowance of time to enable him to discharge the debt and recover the estate,)

have differed from that case in the application of the principle. It has been held that, though the purchase of the equity of redemption by the mortgagee does not ipso facto put an end to the relation of mortgagor and mortgagee, nevertheless the sale to the mortgagee is not a nullity and the mortgagor is bound to follow the procedure allowed by the law to get the sale set aside. Otherwise his right to redeem is barred. This was first laid down in 14 Bom L R 254 (5). There the Court relied on the decision of the Privy Council in 32 I A 23 (2), and also on 35 Cal 61 (3). Although it is not so expressly stated in the judgment the decision in 22 Bom 624 (1), was evidently treated as no longer good law, and the Court's finding was inconsistent with that case. Then there is 28 Bom L R 588 (6), where it was expressly held that 22 Bom 624 (1), is no longer an authority. Reference was made there to an unreported case, S. A. No. 474 of 1929 (7), where it was held that in view of the fact that 22 Bom 624 (1), was cited and discussed in the argument before the Judicial Committee in 32 I A 23 (2), the inference was that the equitable principle had been too broadly stated in that case. Now these decisions of our High Court which have interpreted the decision of the Privy Council and, on the construction which the Court has placed upon that decision, have decided that 22 Bom 624 (1) is no longer an authority, are binding upon us unless it can be shown that there is something in them which is clearly contrary to the law as laid down by their Lordships of the Privy Council.

The learned counsel for the appellant here has taken us very carefully through the facts, of 32 I A 23 (2). That was a very complicated and peculiar case, and it is by no means easy to follow the precise implication of some of their Lordships' observations if it is attempted to apply them to other sets of facts. There is no doubt that the head-note correctly states the main point that was decided in that case, viz.:

A Court has no jurisdiction to sell an equity of redemption unless the mortgagors are parties to the decree or the proceedings which lead to it, or are properly represented on the record. As regards those mortgagors who are not parties thereto, such sales are without jurisdiction, and therefore nullities, and may be disregarded without any proceedings to set them aside.

But what we are concerned with is the position of a mortgagor who was a party to the proceedings and yet has taken no steps to set the sale aside. The passage in the judgment on which reliance is mainly placed both for and against the appellant, is at p. 37 of the report:

Their Lordships therefore substantially agree with the appellate Judge as to his view of the facts of the case. But the Judge has made a decree for redemption of the whole estate, on the ground that 'the mortgagees could not acquire the equity of redemption directly or in-

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directly by purchase at a Court-sale except by a suit brought on the mortgage, on account taken and time specially allowed for redemption.' Their Lordships cannot concur in this view, which they think is based on a misapplication of a sound principle of equity. Their Lordships throw no doubt on the principle, which has been acted on in many cases in India, that a mortgagee cannot, by obtaining a money decree for the mortgage debt and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage.

Their Lordships then went on to refer to special circumstances in the case before them which took it out of the scope of the general rule, and concluded by saying :

In any case the point taken by the appellate Judge would not be a cause of nullity for want of jurisdiction, but a case of irregularity in procedure only.

As Mr. Thakor has pointed out, it does not appear to have been expressly decided in that case what effect failure to take proceedings to set aside a sale to the mortgagee would have had on the mortgagor's right to redeem. On the other hand, I think, it is impossible to say that there is anything in the judgment of their Lordships which is inconsistent with the view taken by this High Court in the two cases to which I have referred. The same view has been taken by other High Courts. There are two Full Bench decisions of the High Court of Calcutta. In the earlier one, 32 Cal 61 (3), two questions were referred for decision : (1) whether, when a sale has been held in contravention of the provisions of S. 99, T. P. Act, the sale is a nullity or an irregular and voidable sale, and (2) whether the right of redemption of a mortgagor is or is not affected by such sale. The first question was answered by holding that a sale held in contravention of S. 99, T. P. Act, is not a nullity but an irregular sale liable to be avoided merely on proof that the terms of S. 99 have been contravened, and further that the application to set aside the sale must be made under S. 244 of the Code of 1882, and must be made before confirmation of the sale, unless the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale proceedings preliminary to sale. The other question was left undecided on the ground that it did not arise in that suit which was not a suit for redemption. Mr. Thakor has relied upon some of the observations of Mr. Justice Mookerjee in this case and argues that if that learned Judge's interpretation of the decision of the Privy Council in 32 I A 23 (2) be accepted, then the appellant's suit for redemption in the present case is not barred.

There is however a later Full Bench decision of the same High Court, 47 Cal 377 (8). In that case the answer is given to the second question referred to the Full Bench in 32 Cal 61 (3) and then left unanswered. It was held that where a mortgagee has in contravention of S. 99, T. P. Act, attached the mortgaged property and brought it to sale and purchased it himself, the mortgagor or his transferee cannot successfully maintain a suit for redemption of the property without first getting the sale set aside. Mookerjee, J., was a party to that judgment also and fully agreed with the decision as his judgment shows. The same view has been taken by a Full Bench of the Allahabad High Court in 37 All 165 (9), and I may note that Sir Dinshah Mulla in his Transfer of Property Act has accepted the position that 22 Bom 624 (1), is no longer an authority. The appeal fails and must be dismissed with costs.

Macklin, J.—I agree and have nothing to add.

V.B./R.K. *Appeal dismissed.*

9. Lal Bahadur Singh v. Abharam Singh, 1915 All 70=27 I C 795=37 All 165=13 A L J 138 (F B).

A. I. R. 1936 Bombay 182

BROOMFIELD AND MACKLIN, JJ.

Dundoobai Anandrao Deshmukh and *others*—Defendants—Appellants.

v.

Vithalrao Anandrao Deshmukh—Plaintiff—Respondent.

First Appeal No. 176 of 1929, Decided on 8th August 1935, from decision of First Class Sub-Judge, Satara, in Civil Suit No. 551 of 1927.

(a) Words and Phrases—"Santati" includes adopted son.

The word "santati" includes an adopted son. [P 185 C 2]

(b) Hindu Law—Adoption—Right of widow to adopt is not dependent on her inheriting as Hindu female owner—She can adopt even though property has not vested in her.

The right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner to her husband's estate. She can

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exercise the power, so long as it is not exhausted or extinguished, even though the property was not vested in her : 1918 *P C* 192, *Foll.* ; *Case law Referred.* [P 186 C 2]

(c) Hindu Law—Adoption—Widow in possession of properties but managed by others —Adoption after 12 years of death of male holder—Adoption held valid and adopted boy entitled to estate of male-holder

After the death of last male holder, his widow was in possession of the properties and she was enjoying it even though it was managed by others whose names were entered in the Record of Rights. The widow made an adoption after 12 years of death of male holder: *Held* : that the adoption was valid and that the adopted boy was entitled to the estate. [P 187 C 2]

(d) Watan—Resumption—Effect is only to levy full assessment by Government—All other rights remain unaffected.

In the case of ordinary watans the effect of resumption is no more than this : Government levies the full assessment and the right to hold free of assessment or at a reduced assessment is lost. All other rights remain unaffected, and hence on the death of the watandar the inam continues to his heirs subject to payment of assessment : *Case law Referrred.* [P 188 C 1]

M. R. Jayakar and *P. B. Gajendragadkar*—for Appellants.

H. C. Coyajee and *P. S. Bakhale*—for Respondent 1.

Broomfield, J.—The suit from which this appeal arises was brought by respondent 1 claiming as the adopted son of one Anandrao who died in 1912, to establish his right to the property of his adoptive father in the hands of the defendants. Anandrao died without issue but leaving three widows, the eldest of whom, Krishnabai, adopted the plaintiff on 4th November 1924. Defendants 1 and 2 are the other two widows. Defendant 3 is the brother of defendant 1 and is in possession of some of the property sold to him by her in 1920. The other defendants are tenants in occupation of some of the lands. The lands in suit are situated in the villages of Chikurde and Peth. They were formerly Deshmukhi watan, but the watan lapsed to Government in 1923. The only contesting defendants were Nos. 1 and 3. At the trial of the suit they made various allegations, denying the adoption, alleging that Krishnabai had been abandoned by her husband, that she had been prohibited from making any adoption, that the sale by defendant 1 to defendant 3 was for legal necessity, and so on. But the trial Court has decided all these issues of fact against the defendants, and their contentions in that respect are no longer persisted in. In order to understand the points raised by the learned counsel on behalf of the defendants in this appeal, it is necessary to state some further facts. The whole of the Chikurde watan originally belonged to Vithalrao Deshmukh, who had four sons, Ganpatrao, Nilkanthrao, Anandrao and Shankarrao. The estate was by custom impartible, and the rule of primogeniture applied to it. In the year 1894 a suit was brought by the younger sons Nilkanth and Anandrao, (Shankar being then dead) against their father and elder brother to obtain a share of the lands for their maintenance. The dispute was referred to arbitration and the award was made : a decree of Court on 15th March 1894.. I shall refer to the terms of this decree (Ex. 46) later on.

At present I merely say that a specific share consisting of lands in the villages of Chikurde and Peth was assigned to Anandrao. Anandrao was in possession and enjoyment of these lands until his death on 6th June 1912. During his lifetime he was entered in the Record of Rights (Ex. 207) as occupant of the land, the description of the nature of his right being "hisedar (sharer) by partition." After his death the name of Firangojirao the son of Nilkanthrao, was entered in his place. The entry in col. 10 as to the nature of his right was "By heirship to Anandrao who was the sharer inamdar according to the decree in Civil Suit No. 137 of 1894." Firangojirao died in 1919. On 23rd September 1921, Government made an order declaring his daughter Bhimabai to be entitled to succeed to him, and her name was entered in the Record of Rights in place of that of her father. By Government Resolution, dated 11th October 1923, that order was cancelled and the watan was declared to have lapsed. The Government Resolution is Ex. 217. In spite of this Resolution Bhimabai continued to be shown in the Record of Rights in col. 9 as occupant. In col. 10 there was a reference to the Government Resolution and it was noted that the lands had been "resumed" and had been "omitted from inam." In the appropriate column in the Register the full assessment was shown as leviable on the lands. As I have already mentioned, the plaintiff was adopted by Krishnabai on 4th November 1924. In spite of the entries in the Record of Rights, to which I have re-

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ferred, the evidence shows that Anandrao's widows continued to be in de facto enjoyment of the lands. Firangoji collected the rent from the tenants and paid it to the widows. After his death defendant 3, to whom some of the lands were sold by defendant 1 in 1920, appears to have managed the rest of the estate on behalf of the widows and paid the income over to them. Bhimabai's estate is being managed by the Court of Wards. But the evidence of Ex. 92, who is a clerk to the Collector and Court of Wards, shows that the income of the lands has been and still is paid to the widows of Anandrao and not to Bhimabai. His evidence is important and some of his statements must be referred to. He says:

The practical effect of the lapse was got ascertained by the Collector from Government and from them it was learnt that the property that was subject of watan inam was converted into khalsa and raitawa property. It was, therefore, made subject to payment of full assessment. I have seen the award of 1894. The lands thereby allotted to Anandrao have been allowed to be retained in possession of the three widows of Anandrao. The khata of those lands too stands in Bhimabai's name. Defendant 3 pays the local fund cess in respect of the lands allotted to Anandrao by the said award, to the Court of Wards on behalf of the three widows. The Court of Wards in its turn pays that amount to Government on behalf of the ward.

Further on the witness says:

The profit of suit lands is not being received and credited by the Court of Wards and on behalf of the ward. The Court of Wards made no change in the possession of suit lands that were allotted to Anandrao by the award of 1894, nor in the possession allowed to be held by his widows after his death.

In cross-examination he said:

There is no express order by the Collector or by Government confirming the possession of suit lands with Anandrao's widows. The Collector has allowed the suit lands to remain with Anandrao's widows as per the award. The Collector supposed the widows as owners of suit property as per the award.

The main contentions of the learned counsel for the appellants in this appeal are these: (1) The award decree was not an absolute grant to Anandrao and his heirs but a grant for the maintenance of himself and his descendants only, giving no right of inheritance to his widows. On his death without issue the estate lapsed to the only male member of the family then surviving, Firangojirao, the son of Nilkanth. Firangojirao became the owner and was succeeded by his daughter Bhimabai. (2) In 1923 Government resumed the watan, and the rights of Anandrao's family, even assuming that any rights remained, were then extinguished. The subsequent adoption of a son to Anandrao, therefore, gave him no title to the suit property. For his first contention, Mr. Jayakar relies on the construction of the award decree, Ex. 46. This begins by reciting that the income of the properties is impartible and that by the custom of the family the law of primogeniture applies to it. It then states that the plaintiffs Nilkanth and Anandrao are to be given some of the income for the maintenance of themselves and their descendants (here the word used is santati), and a land for building a house for residence. Then follows a description of the lands allotted to Nilkanthrao, at the end of which it is stated: "He should accept the same and the permanent vahiwat should continue with him and his heirs." (Here the word used is waras.) Then the lands allotted to Anandrao are specified, and there is a similar statement in his case that he should accept the same, and the permanent vahiwat should continue with him and his heirs. It was provided that the judi on the lands given to Nilkanthrao and Anandrao was to be paid by the defendants, but they were to pay the local fund cess. Then the award decree recites that the remaining immoveable and moveable properties, the cultivated and uncultivated lands, the rocky lands the hilly forest, the Samsthan Vada, all the fallow land in the Gavthan, all the servants kept for service by the grant of lands from the Samsthan, the lands which are with them, all the income of the lands for houses and open spaces, the rights of taking service from the village officers and Balutes, all the Haks which are on the record and which are continued by vahiwat, and so on, were to remain with Ganpatrao, the eldest son. He and his father were to do vahiwat of all the property excepting that which was given to the plaintiffs in the suit, and it was all to continue permanently with Ganpatrao and his heirs. It was also provided that if defendant 1, i. e., the father Vithalrao, assigned his right to Ganpatrao, all the ownership (malki) would pass to Ganpatrao from that time. Then there is an important concluding paragraph:

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It is decided as aforesaid to give the lands to both the plaintiffs. The right of cultivating and producing crops on these lands is with the plaintiffs and their heirs (waras). The plaintiffs and their heirs are to be maintained on that income. The liability for that does not lie in any way on the property of the defendants. Defendants are the owners (malak) and vahiwatdars of the Samsthan. Therefore, there is no risk attaching to the plaintiffs for the debts due to or due from the Samsthan.

I think it is obvious that this decree does make a clear distinction between the rights accorded to the two younger sons and those accorded to the eldest son. The words malak and malaki which are used in respect of the latter are nowhere used in respect of Nilkanthrao or Anandrao. I think that Mr. Jayakar is right in his contention that the grant to the younger sons was not an absolute grant but a grant of the lands for their maintenance. However, the language used in the decree shows that the grant was permanent so long as any heir remained. I am not prepared to accept the learned counsel's contention that the decree gave no right to the widows of Anandrao It is true that the word "Santati," which is used at the beginning of the decree, means progeny or offspring and would not include widows of the grantee. But the word "waras," which is used elsewhere, is a general word which would include the widows 41 I A 275 (1), cited by Mr. Jayakar, does not in my opinion, justify the conclusion that the widows should be held to be excluded. In that case the widows were excluded by the custom of the family. Here no such custom is proved, nor I think can it be presumed to exist. The learned counsel also cited 45 I A 148 (2), where it was held that:

an impartible zamindari is the creature of custom; it is of its essence that no coparcenary in it exists. Apart, therefore, from custom and relationship to the holder, the junior members of the family have no right to maintenance out of it.

A fortiori, Mr. Jayakar says the widows would have no right to maintenance. In the present case, however, no one is claiming a right to maintenance. The plaintiff's case is that the widows of Anandrao took as his heirs, and he takes as Anandrao's adopted son. I do not find anything in the decision or in the reasoning in this case which is inconsistent with the proposition that the grant to Anandrao and his heirs might include his widows.

Further, it seems to me to be doubtful whether it is open to the defendants to set up a plea that the widows took nothing under the decree. Until the case came to be argued their contention had always been that Anandrao's widows took the property as his heirs. In Ex. 33, which is the sale-deed in favour of defendant 3, defendant 1, the vendor, stated "we three widows are the heirs of our husband." In the statement (Ex. 211), which she made before the Mamlatdar in February 1923, she stated that she and the other widows of Anandrao had been doing vahiwat under the award and that Firangojirao had no connexion with the property. As to defendant 3, he has admitted in his deposition in this suit that he was collecting the income of the lands as the agent of defendant 1. Mr. Jayakar says that he has not admitted that he was the agent of the other widows. But he made a statement before the Mamlatdar in 1922 (Ex. 210) in which he clearly stated that Anandrao's widows were his heirs and in the vahiwat of his lands. Neither of them has ever asserted at any time that the widows had no right to Anandrao's estate because it had lapsed to the senior branch. There was nothing to that effect in the pleadings. Both these defendants put in a supplementary written statement in which they alleged that the plaintiff's claim was defeated by the lapse of the watan to Government, but did not allege any lapse of Anandrao's estate to Firangoji.

In my opinion the widows of Anandrao were entitled to succeed to him under the terms of the award decree. I do not consider, however, that the point is really material. The word "santati" would anyhow include an adopted son, as Mr. Jayakar admits. In support of the proposition that the estate lapsed on the death of Anandrao, we have been referred to a note in Sir Dinshah Mulla's "Principles of Hindu Law" at p. 602, to the effect that grants made out of the revenues of an impartible estate for the maintenance of the junior members of the family and their direct male lines revert to the estate on the death of the last male heir of the grantee. Two cases

1. Ekradeshwar Singh v. Janeshwari Bahuasin, 1914 P C 76=25 I C 417=41 I A 275=42 Cal 582 (P C).
2. Rama Rao v. Raja of Pittapur, 1918 P C 81 =47 I C 354=45 I A 148=41 Mad 778 (P C),

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are cited in support of this proposition: 36 I A 176 (3) and 41 I A 275 (1). But in the first of these cases the point was conceded without discussion and in the second it was held that the estate reverted by reason of the custom of the family. These cases, therefore, do not really support the proposition that the estate of Anandrao lapsed on his death. As I have said the defendants have never really alleged that. Their case has been that Firangojirao managed for the widows as their agent and that defendant 3 afterwards did the same. There are a number of letters from Firangojirao and defendant 3 on the record which show that they were collecting the income of the lands from tenants and remitting it to the widows. The natural construction to be put upon these letters seems to me to be that they held themselves accountable to the widows. Really the only support for the doctrine of reverter is to be found in the entries in the Record of Rights to which I have already referred. But I think that any presumption which might have arisen from these entries is rebutted by the admitted fact that the widows remained in actual enjoyment of the property. Bhimabai is not a party to this suit. But so far as the evidence before us goes, I think the only reasonable conclusion is that the enjoyment of the property by the widows was not permissive but in their rights as heirs of Anandrao.

It was suggested on behalf of the respondent that there could be no lapse as long as the widows were living and capable of adopting. In 46 I A 97 (4), their Lordships of the Privy Council have cited a passage from West and Buhler's Hindu Law to the effect that,

the Hindu lawyers do not regard the male line to be extinct or a Hindu to have died without male issue until the death of the widow renders the continuation of the line by adoption impossible.

As this case was decided in 1918, the fact that the doctrine is mentioned without criticism is perhaps of more significance than the observations said to throw doubt upon it in 7 M I A 169 (5).

3. Durgadut Singh v. Rameshwar Singh, (1909) 36 Cal 943=36 I A 176 (PC).
4. Pratapsing Shivsing v. Agarsingji Raisingji, 1918 P C 192=50 I C 457=46 I A 97=43 Bom 778 (PC).
5. Bamundoss Mookerjea v. Mt. Tarinee, (1858) 7 M I A 169=1 Sar 616 (PC).

But it is not necessary to adopt the doctrine in its extreme form. Assuming for the sake of argument that the widows did not succeed as Anandrao's heirs and that the estate had technically reverted to the senior branch, nevertheless, in my opinion, the adoption of the plaintiff by Krishnabai in the circumstances of this case was valid and had the effect of restoring the estate to the family of Anandrao. It appears to me that 46 I A 97 (4), is clearly in point. The facts in that case were that land was granted out of the impartible family estate to younger sons for jivai or maintenance, and by the custom of the family it reverted to the estate upon a failure of the grantee's male descendants, widows being excluded from inheriting. In October 1903 the holder of a jivai grant died without issue but leaving a widow. The widow remained in possession and in March 1904 she adopted a son to her deceased husband. It was held that the adopted son inherited the jivai grant. At p. 107 of the report their Lordships laid down the proposition that the right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner to her husband's estate and that she can exercise the power, so long as it is not exhausted or extinguished, even though the property was not vested in her. At p. 108 their Lordships considered the argument that the adopted son could not take the property after the reversion :

It was contended with considerable force and some degree of plausibility that in the case of a jivai grant on death of the holder thereof there is no property left for the adopted son to take, as it reverts to the grantor's estate immediately the jivaidar dies. But it was admitted that a posthumous son would prevent the reversion. If the widow happened to be enceinte, the reversion would naturally remain in suspense until the birth of the child, to see whether it was a male or a female. It is futile, therefore, to say that the property reverts to the grantor's estate immediately the breath leaves the body of the jivaidar. Here the adoption was made within the period of natural gestation, and the property was at the time of the adoption in the possession of the widow and still is in the possession of the adopted son. It may be that if a Hindu widow lies by for a considerable time and makes no adoption, and the property comes into the possession of some one who would take it in the absence of a son, natural or adopted, and such person were to create rights in such property within his competency whilst in possession, in such case totally different considerations would arise. But here there is nothing of

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the kind to modify the true application of the Hindu law.

Mr. Jayakar has attempted to distinguish this case on the ground that the adoption was made within the period of natural gestation. But it is clear that the decision of their Lordships cannot be distinguished on that ground because they have referred to and followed an earlier case 3 I A 154 (6), where the adoption was made two years after the death of the husband, and it was held nevertheless that it had the effect of defeating the right of the younger brother to the estate.

As regards the widow being in possession of the property, that also was so in the present case to all intents and purposes. For although the lands were entered in the Record of Rights in the name of Firangojirao and Bhimabai, the evidence shows that the income was enjoyed by the widows apparently in their own right. In the recent case, 60 I A 242 (7), *Pratapsingh's* case (4) is referred to at p. 255 as an authority for the proposition that the actual reverter of the property to the head of the family did not bring the power of adoption to an end. Mr. Jayakar says that the adoption may be valid, and indeed he admits that it is valid, and yet it may give no right to the estate which formerly belonged to the adoptive father. He relies on 14 Bom 463 (8). No doubt we have recently held in 37 Bom L R 786 (9), that the rules laid down in 14 Bom 463 (8) still hold good in spite of the recent decisions of the Privy Council on the law of adoption. But those rules do not, I think, apply to the present case, which is covered by the ruling in 46 I A 97 (4). Although the plaintiff was not adopted until twelve years after the death of Anandrao, so that it may certainly be said that the widow had lain by for a considerable time without making an adoption, it cannot be said that the property had come into the possession of some one who would have taken it in the absence of a son, or that rights of third parties had been created in the property. As in 46 I A 97 (4), therefore, there appears to be nothing to modify the true application of Hindu law, I hold for these reasons that the adoption is valid and that the plaintiff is entitled to the estate of Anandrao, unless that estate was extinguished by the resumption of the watan grant by Government.

That brings me to the second point in Mr. Jayakar's argument. In support of his contention, that the resumption by Government had this effect, the learned counsel has relied on 30 Bom L R 1463 (10) and 54 I A 359 (11), two cases which deal with saranjam grants. He relies particularly on the principle laid down in the latter case, that on the death of a saranjamdar, Government is entitled to resume not only the revenue but also all rights and benefits which the grantee has secured by virtue of the grant. He argues that the observations of their Lordships in this connexion at p. 369 of the report apply in principle to other inam grants also. With that view I am unable to agree. Saranjams are governed by special rules which provide inter alia for resumption and re-grant on the death of the grantee, and also that on re-grant the estate passes unencumbered. I do not think it follows that the same principles would apply in the case of a Deshmukhi watan. At the same page of the report of the same case their Lordships have observed :

> As regards the judicial decisions, those with regard to inams do not seem to be necessarily applicable. The word 'inam' is sometimes vaguely applied to all grants of revenue-free land, without reference to perpetuity or any specified conditions. But it would be unsafe to apply to a peculiar grant like saranjam rules which were held applicable to grants in perpetuity.

I am aware that in 10 Bom 112 (12), Sir Charles Sargent expressed the view that there is no distinction in principle between saranjams and other inams. The learned Judge said at p. 116 :

> In the present case we are concerned with a saranjam and not an inam ; but no legislative enactment or Government Resolution has been cited in support of there being any difference between the tenures as regards the effect of resumption by Government.

I think, however, it is clear that the decision in 30 Bom L R 1463 (10), is

6. Sri Raghunadha v. Sri Brozo Kishoro, (1876) 1 Mad 69=3 I A 154 (PC).
7. Amarendra Mansingh v. Sanatan Singh, 1933 P C 155=143 I C 441=60 I A 242=12 Pat 642 (PC).
8. Chandra v. Gojarabai, (1890) 14 Bom 463.
9. Shankar v. Ramrao, 1935 Bom 427=159 I C 697=37 Bom L R 786.
10. Sayaji Rao v. Madhavrao, 1929 Bom 14=115 I C 369=53 Bom 12=30 Bom L R 1463.
11. Secretary of State v. Girjabai, 1927 P C 238 =106 I C 1=54 I A 359=51 Bom 957 (PC).
12. Ganpatrao Trimbak v. Ganesh Baji, (1885) 10 Bom 112.

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based to some extent on the special rules applicable to saranjams and not to other inams, and Sir Charles Fawcett in his judgment in that case at pp. 1471 and 1472, recognized that there may be a distinction between the two kinds of grants. The law which has been consistently laid down as to ordinary watans is that the effect of resumption is no more than this. Government levies the full assessment, and the right to hold free of assessment or at a reduced assessment is lost. The earliest case in that connexion is 1 B H C R 22 (13). In that case an inamdar had effected several mortgages upon his inam lands. The right to hold the lands rent-free was ruled by Government to have ceased upon his death, but the inam was continued to his representatives subject to the payment of assessment. It was held that the original estate in the lands was not destroyed, that no new title in the inamdar's representatives was created, and that the lands continued chargeable in their hands with any valid specific liens created upon them by the inamdar. Reliance was placed on a Government Resolution of 1854 which stated the position in these terms:

> All that the law allows as regards resumption is the discontinuance of exemption from payment of the Government revenue, leaving the inamdar, who is in occupation of the land, to retain the land so long as he pays the assessment imposable on the lands as khalvat land according to the revenue survey settlement.

Then in 9 Bom 419 (14), it was held that on the resumption of an inam the inamdar's right to exemption from the payment of the Government assessment ceases, and the inamdar becomes liable to pay such assessment, but all his other rights remain unaffected. Both these cases were followed in 36 Bom 539 (15). Mr. Jayakar has pointed out that the decision in 1 B H C R 22 (13), was prior to the Hereditary Offices Act. That seems to be immaterial seeing that the other cases were subsequent to it. In 54 I A 359 (11), their Lordships have not referred to a single case dealing with an ordinary inam, and I find nothing in the observations in that case to justify the conclusion that the law laid down in the cases which I have cited is not still good law so far as ordinary inams or watans are concerned. These cases, therefore, cannot be taken to be overruled. It is true of course that Government was not a party to those cases: nor is it a party in the present case. But we have evidence of the attitude taken by Government. I have already referred to the evidence of the Collector's clerk, which I think may be accepted as showing that Government has not claimed in this case that the resumption has any other effect than to make the land liable for the full assessment. The witness being a clerk under the Court of Wards, and in the management of Bhimabai's estate, must be acquainted with the facts. Now it cannot be disputed that it is competent to Government to rest content with the levy of full assessment whatever else might have been done. So that even if the principles laid down in the two saranjam cases relied upon by Mr. Jayakar did apply, they would not in my opinion affect the decision in the present case. As against these defendants, whose rights such as they may be, are derived not from Bhimabai but from Anandrao or his widows, the plaintiff is entitled to succeed. The decision in this suit is of course not binding on Bhimabai or on Government.

The only other point argued on behalf of the appellants is that the amount of maintenance which has been awarded to defendant 1 is insufficient. The trial Judge has awarded her Rs. 150 a year. He awarded Rs. 144 a year to defendant 2, but gave defendant 1 a little more as she is blind. The plaintiff in his statement in answer to certain questions by the Court (Ex. 34) stated that he was prepared to pay Rs. 150 to Rs. 200 annually to defendants 1 and 2. Krishnabai stated in her evidence (Ex. 83) that she used to receive Rs. 200 to Rs. 250 a year. Defendant 2 has given the same figure. The only evidence as to the income is that of Dattatraya, the Diwan (Ex. 95). He says that Anandrao used to get about Rs. 700 a year as profits from the lands other than those mortgaged, and that at present those lands fetch an annual rent of about Rs. 800 a year. In the plaint the mesne profits per year were also valued at Rs. 800. I think that on this evidence and in view of her disability it would be

13. Vishnu Trimbak v. Tatia Pant, (1863) 1 B H C R 22.
14. Gangabai v. Kalapa Dari, (1885) 9 Bom 419
15. Gurbasappa v. Rango Venkatesh, (1912) 36 Bom 539=16 I C 348.

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reasonable to award Rs. 200 a year to defendant 1. We increase the amount of maintenance accordingly. We are informed that the lands mentioned in Sch. 3 which were formerly mortgaged have now been redeemed. At Mr. Jayakar's request we give liberty to both the widows, defendants 1 and 2, to apply, if they are so advised, for an increase of their maintenance on the ground of the increased income of the estate. The decree of the trial Court will be modified accordingly.

We must also make two other minor modifications in it. The declaration that the plaintiff is the validly adopted son of the late Anandrao, etc., will stand as it is. The second declaration given that as such adopted son he is the owner of the entire suit property minus the open space, etc., will be modified as follows: Declared that as such adopted son he is entitled to possession of the entire suit property as against the defendants in this suit with the exception of the open space added by amendment, and of property (2) in Sch. 1 to the plaint. It was alleged by the defendants that this latter item of property is in Bhimabai's possession and the plaintiff has admitted this. He is not entitled in this suit to any decree against Bhimabai. In other respects the trial Court's decree will stand. As the appeal substantially fails the appellants must pay the costs of respondent 1. The cross-objections are not pressed and are dismissed with costs.

Macklin, J.—I agree and have nothing to add.

K.S./R.K. *Decree modified.*

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BEAUMONT, C. J. AND MACKLIN, J.

Zipru Krishna and *others*—Plaintiffs.

v.

Pannalal Bahirudas—Defendant.

Civil Ref. No. 14 of 1934, Decided on 13th November 1935, from order of Dist. Judge, East Khandesh, Jalgaon.

Civil P. C. (1908), O. 21, R. 72, S. 70—Bombay Local Government Rules, Rr. 11 and 15—Transfer of execution to Collector—Judgment-debtor minor—Permission to bid still can be granted by Civil Court.

Where the execution proceedings are transferred to the Collector for sale of immoveable property and the judgment-debtor is a minor, a civil Court has still the power to give permission to the decree-holder to bid at the sale. [P 191 C 1]

G. M. Joshi—for Plaintiffs.

H. C. Coyajee and *P. B. Gajendragadkar.*—for Defendant.

B. G. Rao—for the Crown.

Beaumont, C. J.—These are three applications which raise the same question of law. Civil Reference No. 14 of 1934 is a reference by the District Judge of East Khandesh under O. 46, R. 1, Civil P. C.; Civil Reference No. 16 of 1934 is a reference by the Subordinate Judge made through the District Judge of Ahmednagar also under O. 46, R. 1; and Civil Revision Application No. 277 of 1934 is an application in revision against the judgment of the First Class Subordinate Judge of Jalgaon. The question which arises in all the cases is whether when execution proceedings have been transferred to the Collector for sale of immoveable properties and the judgment-debtor is a minor, power to the decree-holder to bid can be given either by the Collector or by the Court. The question seems to have given rise to a considerable difference of opinion, and there is no authority directly on the point. But the question lies within a narrow compass. Under O. 21, R. 72, it is provided that no holder of a decree in execution of which property is sold, shall without the express permission of the Court, bid for or purchase the property. That rule clearly implies that the Court has power to give permission in all cases of sale in execution, to the decree-holder to bid, and that power would clearly exist whether the judgment-debtor was a minor or not. The Court can always make an order against or give consent on behalf of a minor who is a party in a suit before it and properly represented. Then the next provisions to look at are S. 68 and the following sections of the Civil P. C. S. 68 provides that the Local Government may declare as therein provided that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold shall be transferred to the Collector. S. 69 applies the provisions in Sch. 3 to cases in which the execution of a decree has been transferred to the Collector.

Then S. 70 (1) provides that the Local Government may make rules consistent with the aforesaid provisions: (a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his Sub-

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ordinates in executing the same and for re-transmitting the decree from the Collector to the Court: (b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector: (c) is not relevant. Sub-cl. (2) provides that a power conferred by rules made under sub-s. (1) upon the Collector or any gazetted subordinate of the Collector or upon any appellate or revisional authority, shall not be exercisable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court. The scheme of that section seems to me to be that where the execution of a decree for the sale of immoveable property is transferred to the Collector, the Local Government may make rules regulating such execution and may confer upon the Collector all or any of the powers which the Court would have possessed in such execution if it had not been transferred; and where powers have been transferred to the Collector, those powers cannot be exercised by the Court. That is to say there cannot be two conflicting authorities exercising the same powers. But the section gives no authority to the Local Government to prevent the Court from exercising a power which is not tranferred to the Collector. The authority extends to determining whether a power is to be exercised by the Court, or by the Collector, but not to the destruction of a power.

Then the next matter to look at is the code of rules issued by the Local Government under S. 70, Civil P. C. They are contained in the sub-rules of R. 91, Manual of Civil Circulars in Chap. II dealing with "Execution of Decrees," and the material rules are sub-rules (11) and (15). Sub-rule (11) provides that no holder of a decree in execution of which property is sold shall, without the express permission of the Collector or other officer aforesaid being a gazetted officer, bid for or purchase the property. That rule taken by itself would seem to transfer to the Collector the power of granting leave to the decree-holder to bid in all cases in which the Court would possess such power under O. 21, R. 72, if the execution had not been transferred to the Collector. One must, however, read sub-rule (11) with sub-rule (15). Sub-rule (15) is headed "Powers of Executing officer" and it confers upon Collectors and gazetted officers subordinate to a Collector, to whom a decree is transferred under R. 2 (a), the power specified in sub-rule (1), R. 72, O. 21 of Sch. 1 to Civil P. C., provided that the Collector or other officer aforesaid, to whom an application for such permission may be made, 'shall not grant such permission unless the decree-holder satisfies him that the application is made in good faith and that the judgment-debtor is not a minor. The rest of the rule is not relevant.

Now the argument on behalf of the respondents is that what is transferred to the Collector by sub-rules (11) and (15) is the power to consent to the decree-holder purchasing in every execution transferred to the Collector, and that such transfer prevents the Court from exercising the power by virtue of sub-s. (2), S. 70, Civil P. C., notwithstanding a limitation on the Collector's power where the judgment-debtor is a minor. No doubt the actual wording of the rule does give some scope for that argument. But we have to read the sections and rules to which I have referred together and see what the scheme of the legislature is. If we adopt the construction of sub-rules (11) and (15) to which I have referred, then it follows that where the judgment-debtor is a minor nobody can grant a consent to the decree-holder to purchase. The Collector cannot do it because he is expressly forbidden under sub-rule (15), and the Courts cannot do it because all their powers in the matter have been transferred to the Collector. It would be a misfortune if the Collector is debarred from selling to a decree-holder who is prepared to make a satisfactory offer in every case in which the judgment-debtor is a minor. The other construction contended for is that what is transferred to the Collector is the power to consent to the decree-holder purchasing in all cases in which the judgment-debtor is not a minor, but that in cases in which the judgment-debtor is a minor, power to consent is not transferred to the Collector. I think that the latter construction is the right one to put upon the rule. As I have already pointed out S. 70 of the Code does not enable the Local Govern-

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ment to make rules destroying any power which is vested in the Court; all that it can do is to transfer such powers. In my opinion in so far as either sub-rule (11) or (15) operates to prevent the Court from exercising a power which is not transferred to the Collector, the rule is ultra vires. But I think that the rules, on their true construction, have not that effect, and that the Government has not purported to transfer to the Collector the power of consenting to the decree-holder purchasing in those cases in which the judgment-debtor is a minor. It has been argued that to hold that the civil Court retains any power in respect of an execution which has been transferred to the Collector will occasion serious inconvenience.

I am unable to appreciate that argument. There is no doubt that when execution of a decree has been transferred to the Collector, the Collector is the person who is to carry out the execution and to decide in what way the sale is to be effected. If the Court gives power to the execution creditor to purchase where the judgment-debtor is a minor the result of that permission will be to extend, and not to limit, the discretion of the Collector in carrying out the sale. He will have power in a proper case to sell to the execution creditor, notwithstanding the minority of the judgment-debtor. I need hardly say that the fact that the Court gives permission to the execution-creditor to bid does not bind the Collector to accept an offer from the execution-creditor. I think therefore that we ought to hold that when execution proceedings are transferred to the Collector for sale of immoveable property and the judgment-debtor is a minor, a civil Court has power to give permission to the decree-holder to bid at the sale. The questions raised in the two references will be answered in this sense, and the revision application will be allowed. In Civil References Nos. 14 and 16 of 1934 costs will be costs in the cause. In Civil Revision Application No. 277 of 1934 the applicant is entitled to add costs of both the Courts to his claim.

V.B./R.K. *Reference answered.*

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BARLEE AND N. J. WADIA, JJ.

Vithaldas Govindram Gandhi—Appellant.

v.

Vadilal Chhaganlal Shah and *others*—Respondents.

First Appeal No. 124 of 1933, Decided on 23rd September 1935, from decision of Assistant Judge, Ahmedabad, in Misc. Appln. 195 of 1932.

(a) Hindu Law — Succession — Exclusion from—Non-congenital lunacy — Effect of— It does not deprive member of his status as member of coparcenary or of his coparcenary interest.

Under the Mitakshara School of Hindu law a coparcener taking an interest in the family property by birth, does not lose his status as a member of coparcenary interest by reason of subsequent lunacy, although his lunacy may disqualify him from asking a share in partition. Where therefore such a member becomes the sole surviving member of the family, he takes the whole property by survivorship : 1920 *Mad* 652 and 1934 *Pat* 373, *Foll.* ; 6 *Bom* 616 and 1923 *Mad* 215 (*F B*), *Disting*, [P 192 C 2]

(b) Letters of Administration—Grant of— Courts in Bombay can grant letters of administration in respect of undivided family property.

In Bombay Presidency, it is competent to the Court to grant letters of administration in respect of undivided family property : 1935 *Bom* 242 and 28 *Bom* 644, *Foll.* [P 193 C 1]

G. N. Thakor and *B. G. Thakor* — for Appellant.

C. K. Shah and *C. C. Desai*—for Respondents.

Barlee, J.—The appellant applied for limited letters of administration in respect of certain property in the Ahmedabad District which, he said, belonged to one Vadilal Gulabji who died on 16th April 1912. At the date of his death he left a son Jivram, who was then a lunatic though he does not appear to have been a congenital lunatic. Jivram was married and had a daughter called Bai Jashi. Bai Jashi married one Vadilal Chhaganlal and died on 16th June 1930. The petitioner presented his application on behalf of the lunatic Jivram since he had been appointed a curator of the lunatic by the Huzur Court of the Mansa State. The property in respect of which letters of adminisiration were asked consisted of certain shares in a company at Ahmedabad. The application was contested by Vadilal Chhaganlal, the husband of the deceased Bai Jashi, and the question on

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which the parties fought in the Court of the Assistant Judge of Ahmedabad was whether the lunatic Jivram was entitled to the estate of the deceased Vadilal Gulabji as his heir. The opponents' case was that Jivram was not entitled as he was a lunatic, and the learned Assistant Judge, following the case of 6 Bom 616 (1), decided that the lunatic Jivram was debarred from taking the property as the heir of the deceased Vadilal Gulabji and that the petitioner was therefore not entitled to letters of administration under S. 246, Succession Act.

The curator has appealed and Mr. C. K. Shah on behalf of the respondents has taken a preliminary objection that the curator has no locus standi inasmuch as his appointment has been cancelled by the Huzur Court of the Mansa State. We have not all the papers here on this point ; but it appears that the order of the Huzur Court of the Mansa State has been suspended and prima facie the appellant, V. G. Gandhi, is still the curator. There would apparently be no objection to his being recognized by a Court in British India since he is the person who has been appointed by the Mansa Court and presumably the lunatic was domiciled in Mansa.

The decision on which the learned Assistant Judge has based his finding, 6 Bom 616 (1), was not directly in point. One Bapuji died, leaving him surviving Lakshman, his undivided son, who had been born deaf and dumb, and the defendant Pandurang, his undivided nephew. It was held that Lakshman was disqualified from inheriting and that therefore on Bapuji's death Pandurang had succeeded to the entire family estate and was competent to dispose of it ; and that a son subsequently born to Lakshman could not recover any part of the estate sold from the purchaser. The present case is distinguishable on the ground that Jivram was not a congenital idiot and therefore did become a coparcener on birth, whereas in 6 Bom 616 (1), the son never became a coparcener. The present case seems to us to be on all fours with that of 43 Mad 464 (2). One Gangadhara Gurukkal was entitled to an archaka office in a temple. Though he was born sane, he became insane after his son Subbayya attained his majority. During the period of Gangadhara's insanity Subbayya was doing the archaka service. Subbayya died in 1874. Gangadhara continued insane until his death, which took place in 1880. Subbayya's widow died in 1911 and Gangadhara's widow died in 1912. The plaintiff as the reversioner of Subbayya, the son, brought the suit against the daughter and daughter's son of Gangadhara for a declaration of his right to, and for possession of, the office of archaka. Defendants were the daughter and grandsons of Gangadhara and so they were sister and sister's sons of Subbayya. If the property belonged to Subbayya, the defendants being only the sister and sister's sons of the owner were excluded by the plaintiff. If, on the other hand, Gangadhara was the owner at the time of his death, the defendants, as his daughter and daughter's sons, would exclude the plaintiff. The question then was whether Gangadhara, on the death of his son, took the property as the last male holder of the family.

Their Lordships considered at length the Sanskrit texts and decided that the right of a member of Hindu joint family to share in ancestral property comes into existence at birth, and is not lost but is only in abeyance by reason of a disqualification. It subsists all through, although it is incapable of enforcement at the time of partition, if the disqualification then exists. Hence, if on the death of all the other members the disqualified member becomes the sole surviving member of the family, he takes the whole property by survivorship. This decision is directly in point ; for here Jivram was a coparcener at birth, and though his lunacy would have disqualified him from asking for a share on partition, on the death of his father he became the last surviving male of the family. The learned Assistant Judge failed to notice that the Bombay case of 6 Bom 616 (1) was distinguishable. It is of course binding on us so far as it goes. But it merely decides that the congenital deaf mute is not a coparcener and goes no further. We think that it would be dangerous to extend this principle by analogy to the case of members of a family who become disqualified by subsequent disqualifications. Both these cases have been considered by a Bench of the Patna High Court in

1. Bapuji v. Pandurang, (1882) 6 Bom 616.
2. Muthusami Gurukkal v. Meenammal, 1920 Mad 652=55 I C 576=43 Mad 464.

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13 Pat 712 (3), where it was decided, following the Madras case, that under the Mitakshara School of Hindu law, a coparcener taking an interest in the family property by birth merely becomes incapable of enforcing his right to a share upon partition upon becoming afflicted with madness and does not lose all his coparcenary interest by reason of the disability. The case of 6 Bom 616 (1), was mentioned and distinguished on the ground, which I have noted, that it was a case of a congenital deaf mute.

Mr. Shah has drawn our attention to a Full Bench decision of the Madras High Court in 45 Mad 949 (4). That case merely decides that the rule of Hindu law that a congenitally blind person is excluded from succession has not become obsolete. It is not on all fours with the present case. The learned advocate relies on some observations of Coutts Trotter, J., at p. 976, where the learned Judge expresses the view that the rule of exclusion in the Mitakshara applies to those who take by survivorship as well as to those who take by succession. This may be conceded ; but it does not touch the main point whether a member of a family who becomes insane loses his status as a member of a coparcenary. On this ground we differ from the learned Assistant Judge.

Mr. Shah has raised another point. He seeks to put the appellant into a dilemma. If the family property be the separate property of Vadilal, the lunatic, he says, cannot claim it ; whilst if it be joint property, there is no machinery by which he can be given a certificate under the Succession Certificate Act. But the answer to this is given in various decisions of our Court. In Bombay letters of administration are always granted in respect of undivided family property. The latest case is a decision of Kania, J., in 37 Bom L R 300 (5). A petition was filed for letters of administration of the joint family properties and credits standing in the name of one Govindji Khushal. No one objected that letters of administration could not be given of the joint family properties, and the order was that letters of administration should issue to Ujambai for the use and benefit of her minor son Amritlal Govindji Khushal and limited to the period of his minority with the exception of the separate property of the deceased, i. e., they were granted with respect to the joint family property only. In 28 Bom 644 (6), Jenkins, C. J., remarked (p. 646) :

> The point urged on behalf of the appellant is that the deceased was, at the time of his death, joint in family and entitled only to joint property ; so that letters of administration could not be granted, as though he had left separate property. But in Bombay it has been repeatedly held that on applications for probate the Court will not enter on a question as to the title to the property which the testator by his will purports to leave.

And letters of administration were granted. Our conclusion then is that the learned Assistant Judge was incorrect in his decision that the applicant was not entitled to letters of administration under S. 246, Succession Act, on behalf of the lunatic Jivram. The appeal will therefore be allowed. The order of the learned Assistant Judge is set aside. The papers will be returned to him so that he may deal with the case in accordance with law. The appellant will get his costs of the appeal and the security given by the appellant is discharged.

N. J. Wadia, J.—I agree.

R.M./R.K. *Appeal allowed*

3. Mt. Dilrajkuari v. Rikheswar Ram Dube, 1934 Pat 373=151 I C 419=13 Pat 712=15 P L T 479.
4. Pudiava Nadar v. Pavanasa Nadar, 1923 Mad 215=69 I C 313=45 Mad 949=43 M L J 596 (F B).
5. Ujambai v. Harakchand, 1935 Bom 242 = 156 I C 621=59 Bom 644=37 Bom L R 300.
6. Ochavaram Nanabhai v. Dolatram Jamietram, (1904) 28 Bom 644=6 Bom L R 966.

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TYABJI, J.

Emperor.

v.

Abdul Rahiman Akramdin and *another* —Accused.

Reference in Criminal Case No. 16 of Fourth Criminal Session of 1935, Decided on 18th October 1935.

(a) Criminal P. C. (1898), S. 369—General rule of S. 369 operates only when Court signs its judgment—In Bombay High Court Original Criminal Side judgment and warrant are signed together — Practice is to review or alter sentence before signing warrants in proper cases.

The effect of S. 369, Criminal P. C., may, speaking broadly and without attempting strict accuracy, be put under three heads: (1) it saves powers to correct clerical errors; (2) it proves that as a general rule no Court shall alter or review its judgment after it has signed it, except to correct clerical errors; and (3) in cases

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where the judgment has been signed and it is sought (in contravention of the general rule) to alter or review the judgment for the purpose of correcting errors other than clerical, power to correct such errors as reserved only if it can be derived from any provisions in (a) the Criminal Procedure Code, or (b) in any other law for the time being in force, or (c) (in the case of a High Court established by Royal Charter), by the Letters Patent of such High Court. In Bombay High Court exercising its Ordinary Original Criminal Jurisdiction, no judgment or other pronouncement of its decision is signed until the warrant is signed by the presiding Judge. The warrant is drawn up some little time after the sentence has been orally pronounced. The practice has been for the Judges in proper cases to review their sentences though already pronounced in Court so long as the warrant has not been drawn up and signed. That practice is not in conflict with S. 369. So before signing a warrant, Court can alter or review its sentence. [P 195 C 1]

(b) Criminal P. C. (1898), S. 238 (1) (2)—No definition of minor offence—Test of major and minor offence is not gravity of punishment — When offence becomes major or minor explained.

There is no definition of the expression "minor offence" in S. 238, Criminal P. C. Under S. 238 (1), test of major or minor offence is not the gravity of the punishment incurred. The sub-section does not refer to the gravity of punishment at all: it merely refers to the number of particulars constituting the offence: if a number of particulars is needed to constitute the offence, then for the purposes of S. 238 (1), it may be called the major offence: if a combination of some only of such particulars constitutes a complete offence, then that offence is referred to in S. 238 (1), as the minor offence. It should not, however, be overlooked that S. 238, sub-s. (2), speaks of the proof of additional facts reducing an offence to a minor offence, and this does not accord with the view that the minor offence must always consist of fewer particulars than the major offence. [P 196 C 2]

(c) Criminal Trial—Conspiracy to cheat—Conspiracy not proved—Offence of cheating without conspiracy established—Conviction can be for cheating alone.

Where accused were charged with cheating in pursuance of a conspiracy and a conspiracy was not proved but the evidence showed that an offence of cheating without conspiracy was committed, Court can punish the accused for cheating only. [P 196 C 2; P 197 C 1]

G. C. O'Gorman and *R. J. Kolah*—for the Crown.

N. H. Jhabvala and *M. J. Sethna*—for Accused Nos. 1 and 2 respectively.

Order.—It has been submitted by the Clerk of the Crown for consideration whether the sentences passed by me on accused 1 and 2 were in accordance with law. Accused 1 and 2, with two other persons, were tried before me and a jury, under five charges: (1) the first charge was of a criminal conspiracy to print and forge railway tickets, to use them as genuine and to cheat intending passengers and the Railway Company (S. 120-B, I. P. C.) The other four charges were charges of having committed offences in pursuance of the said conspiracy, viz., (2) of forging railway tickets (Ss. 467, 34), (3) of forging the tickets knowing that they would be used for the purpose of cheating (Ss. 468, 34), (4) of dishonestly using the tickets as genuine (Ss. 467, 471, 34) and (5), of cheating by fraudulent and dishonest representations of having purchased the tickets and inducements, requests for payment, etc., connected with or following such representations (Ss. 417, 34). The jury brought in unanimous verdicts of 'not guilty' against all the accused in respect of the first four charges. As to the fifth charge the jury unanimously acquitted accused 3 and 4; but a majority held accused 1 and 2 guilty. I accepted the verdict of the majority finding accused 1 and 2 guilty under the fifth charge, viz. of cheating in pursuance of the conspiracy. I deferred passing sentence for a day, and then after hearing counsel, sentenced accused 1 and 2 to terms of imprisonment and fines.

The question now raised is whether the verdict of the majority as to the fifth charge was legal—whether accused 1 and 2 can be found guilty under the fifth charge, having been found not guilty under the first four charges (the first of which was of conspiracy), and whether consequently my sentences on accused 1 and 2 were legal and ought to be allowed to stand. The Clerk of the Crown submitted this question when the warrants were placed before me for signature. Out of deference to that Officer's doubts, I had the matter argued before me. It was contended for the Crown, mainly on the strength of the Criminal Procedure Code, S. 369, that at the present stage this Court has no authority to consider the question raised; that the sentences having been pronounced, they cannot be altered except under the Letters Patent. Cls. 25 or 26. S. 369, Criminal P. C., runs as follows:

> Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court when it has signed its judgment, shall alter or review the same, except to correct a clerical error.

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So that clerical errors may be corrected; but otherwise no Court may, after it has signed its judgment, alter or review it except by virtue of a power derived under the Code or other law or the Letters Patent. The effect of S. 369 may — speaking broadly and without attempting strict accuracy—be put under three heads: (1) it saves powers to correct clerical errors; (2) it provides that as a general rule no Court shall alter or review its judgment after it has signed it, except to correct clerical errors; and (3) in cases where the judgment has been signed and it is sought (in contravention of the general rule) to alter or review the judgment for the purpose of correcting errors other than clerical; power to correct such errors is reserved only if it can be derived from any provisions in (a) the Criminal Procedure Code, or (b) in any other law for the time being in force, or (c) (in the case of a High Court established by Royal Charter), by the Letters Patent of such High Court. The alleged error in the present case is certainly not clerical. It is argued therefore that S. 369 prevents the correction of the alleged error at the present stage unless jurisdiction to do so is derived from some provision of the Code or any other law for the time being in force, or the Letters Patent. I shall refer to the Letters Patent a little later; but I must first observe that what I have stated as the general rule under S. 369 comes into operation only when the Court has signed its judgment. In the case of the High Court exercising its Ordinary Original Criminal Jurisdiction, no judgment nor any other pronouncement of its decision is signed until the warrant is signed by the presiding Judge. The warrant is drawn up some little time after the sentence has been orally pronounced.

The practice has been for the Judges in proper cases to review their sentences though already pronounced in Court so long as the warrant has not been drawn up and signed. That practice does not seem to me to conflict with S. 369 but to conform with the implications in what is left unexpressed in S. 369. I therefore come to the conclusion that, not having yet signed the warrant, the power to alter or review my sentences does not fall under what I have stated as the general rule contained in S. 369. Nor does the case fall under the third head of S. 369 as stated by me. I may therefore act in accordance with the practice without seeking the support of any specific provision in the Code or other law or the Letters Patent. If I am right in this view, then the question is, whether the verdict of the majority of the jury holding accused 1 and 2 to be guilty under 5th charge was legal and could have been accepted, and whether thereupon sentences could legally be passed upon the accused 1 and 2. The legality of the verdict of the majority is questioned because the fifth charge is of cheating in pursuance of the conspiracy, and the jury have unanimously found all the accused not guilty of the offence of conspiracy. The jury, it is rightly contended, cannot therefore find under fifth charge that in pursuance of a conspiracy —which the jury held did not exist—accused 1 and 2 cheated or did any fraudulent or dishonest acts. But the verdict of the jury on the fifth charge in reality expresses the view that though it is not proved that there was any such conspiracy as the fifth charge alleges, yet accused 1 and 2 did fraudulently and dishonestly represent that they had purchased railway tickets (though it is not proved that they had conspired or agreed amongst themselves or with accused 3 and 4 to make such representation) and that they induced passengers to refrain from purchasing tickets from the railway, and that they committed the offence of cheating, punishable under S. 417. The verdict was at the time taken, and in my opinion rightly taken, to be a verdict only that the offence of cheating under S. 417 had been committed by the two accused.

As I deferred passing sentences till the day following the verdict and the accused were defended by counsel, there was sufficient time to consider the practical bearing of the question. It was not then, nor has it to-day, been suggested that except from the aspect of its technical legality there is any reason why the verdict may not be accepted. The question then turns into the question whether on the jury finding all the accused unanimously not guilty on the first four charges, it was legally permissible to find the accused guilty of cheating on the fifth charge under S. 417; in other words, whether on a charge of cheating in pursuance of a conspiracy, the accused

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may be found guilty of cheating without a conspiracy. The answer to that question must be found, it seems to me, in Ss. 236, 237 and 238, Criminal P. C. It is desirable to consider these sections together. The first deals with a case where the facts proved are of such a nature that it is doubtful which of several offences the facts that are proved constitute. In such a case the accused may, under S. 236, be charged with having committed all or any of such offences; and under S. 237 he may be convicted of an offence although he was not charged with that particular offence: where the accused is charged with one offence and it is proved that he has committed a different offence for which he might have been charged under S. 236, he may be convicted of the offence which is shown to have been committed, although he was not charged with it. These two sections therefore deal with cases where all the facts constituting the offence of which the accused is sought to be convicted, have been alleged in the charge and have been proved, but where it is doubtful what offence those facts constitute. It may accordingly happen that the accused is convicted of an offence with which he was not charged.

Under S. 238 again a person may be convicted of an offence with which he is not charged, provided that the facts constituting the offence of which he is sought to be convicted have been alleged and proved, although other facts are also alleged and those other facts are not proved. The section deals in terms with a case where a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and where such combination is proved but the remaining particulars are not proved. In such a case the accused may be convicted of that offence which the combination of the particulars that are proved constitutes, although the remaining particulars are not proved—and this notwithstanding the fact that the specific offence with which he was charged would have been proved only if the rest of the particulars which had been alleged had also been proved—so that he cannot be convicted of the specific offence with which he has been charged. It was argued that S. 238 is not applicable to the present case, though several particulars were mentioned in the charge, and some of the particulars are proved while other particulars have not been proved and though a combination of those particulars that have been proved constitutes an offence.

The contention is that the offence which the particulars that have been proved constitutes is not a minor offence within the terms of S. 238. It is admitted that there is no definition of the expression 'minor offence'. (The expression 'major offence' is not used in the section, but it is convenient to adopt it in the present context.) It is argued that the expression 'minor offence' can apply only to a case where, for instance, a person is charged with murder, but it is proved that he has committed not the major offence of murder but the minor offence of grievous hurt or the still more minor offence of simple hurt. I do not think the argument relied upon is sound. It seems to me to proceed on the unwarranted assumption that the test by which an offence is deemed in S. 238 (1) to be major or minor is the gravity of the punishment incurred. The sub-section does not refer to the gravity of punishment at all; it merely refers to the number of particulars constituting the offence: if a number of particulars is needed to constitute the offence, then for the purposes of S. 238 (1), it may be called the major offence: if a combination of some only of such particulars constitutes a complete offence, then that offence is referred to in S. 238 (1), as the minor offence. I do not overlook that S. 238, sub-s. (2), speaks of the proof of additional facts reducing an offence to a minor offence, and this does not accord with the view that the minor offence must always consist of fewer particulars than the major offence. But this is only a new form that the situation takes.

In any case, I do not think it is necessary to pursue the question, because it is admitted that in the present instance the charge alleged several particulars, all of which were not proved: but a combination of those that were proved constitutes a complete offence, viz., the offence of cheating. As it happens, if all the particulars that were alleged had been proved, liability to a higher punishment would have been incurred. Presumably this would happen in most cases: the additional particulars would not be

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alleged in the charge unless they had the effect of enhancing the punishment or some similar effect; the charge would presumably not allege more facts than are necessary for proving liability to the highest punishment. But, confining myself to the present case, I do not see in what sense that offence, which the facts that have been proved constitute, is not to be considered a minor offence. It is a minor offence in the sense that it consists of a combination of fewer particulars than were alleged; it is also a minor offence in the sense that punishment to which the accused became liable is less grievous than that to which they would have been liable if all the particulars alleged in the charge had been proved.

The view taken by me of the verdict seems to me, therefore, to have been in accordance with law, that though all the particulars alleged in the fith charge had not been proved, some of them had been proved; that a combination of the particulars that have been proved constitutes a complete offence—the offence of cheating—which must under S. 238 (1), be considered, for the purpose of this charge, to be a minor offence. The accused may consequently be found guilty under the fifth charge of the offence of cheating not committed in pursuance of any conspiracy. It was pressed upon me by counsel that there was a degree of doubt in the question; and it was suggested that I should in some form express the desirability of a certificate under Cl. 26 being granted by the Advocate-General. I think these arguments were based on some misapprehension. My own view is that, as I have not yet signed any judgment, S. 369, Criminal P. C., does not preclude the correction of any error that may be discovered in the sentences that I have pronounced—that I may at the present stage correct the error (if there was any) without deriving authority to correct the error from any provision in the Code, or any other law for the time being in force, or in the Letters Patent of this High Court. In other words, I think, I have not finally and irrevocably pronounced any sentences: if I find that the sentences verbally pronounced by me were illegal, I can consider them as not pronounced, and proceed in accordance with law. If then I had agreed with the view presented by the counsel for the defence, the proper course for me would have been to give effect to that view by my own revised sentences or if I had felt doubtful on the point, to exercise my discretion under Cl. 25 of reserving the point of law for the opinion of the High Court. I have not considered it necessary to follow either course.

What, however, was referred to by counsel was Cl. 26, not Cl. 25, of the Letters Patent. Cl. 26, so far as relevant, gives the High Court power and authority to review the case and alter the sentence of the Court of Original Criminal Jurisdiction, on its being certificated by the Advocate-General that in his judgment there is an error in the decision of a point or points of law decided by the original Court, or that a point or points of law decided by the said Court should be further considered. This provision is to be brought into operation after the Court of Original Criminal Jurisdiction has decided the case. It would be obviously improper for me, in the view that I have taken, of saying anything with reference to the certificate referred to in Cl. 26, which is for the purpose of my errors being reviewed and set right. In my opinion, therefore, I need not give any other orders; the warrants will be drawn up in accordance with the sentences already pronounced by me.

B.D./R.K. *Order accordingly.*

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MACKLIN, J.

Bai Fatma—Defendant—Appellant.

v.

Gulamnabi Hajibhai and *others* — Plaintiffs—Respondents.

Second Appeal No. 1066 of 1931, Decided on 24th September 1935, from decision of Asst. Judge, Ahmedabad, in Appeals Nos. 46 and 48 of 1930.

(a) Partition Act (4 of 1893), S. 4—Expression "undivided property" is not confined to Hindu joint families—It includes also Mahomedan.

The expression "undivided property" occurring in S. 4 is not confined to joint Hindu families nor to families of other religions which happen to have adopted Hindu notions of jointness. It also includes Mahomedans who are undivided in the sense with which the expression is used in S. 4. [P 198 C 2]

(b) Partition Act (4 of 1893), S. 4—Person not in occupation of property and having no intention of occupying it is not entitled to benefit of S. 4, although owner of property.

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A person who is not in occupation of a house belonging to an undivided family and who has no intention of occupying it in future, is not entitled to the benefit of S. 4 merely because he is an owner. [P 199 C 1]

A female member of an undivided family marrying and going to live in her husband's house prima facie gives up her intention of residing in the old house belonging to the family, and being married is also no longer a member of the family, and as such she is not entitled to the benefit of S. 4 with reference to the house: 30 *All* 324 (*FB*); 23 *Bom* 73 and 7 *I C* 436, *Disting.* [P 199 C 2]

H. H. Dalal and *I. B. Desai*—for Appellant.

P. A. Dhruva—for Respondents.

Judgment. — The facts relating to this second appeal are as follows:

The original owner of the house in suit died leaving a widow, two sons, and a daughter, who is the appellant in this appeal. The widow and one of the sons sold the house in suit and another house to the father of the present plaintiffs. The purchaser himself took possession of one of the houses, but allowed his vendors to stay in the suit house as his tenants. In 1913 he sued them for possession of the house on the strength of his rent-note, but was met by the contentions of the present defendant-appellant that she had a share in the house and that her share had not been sold to the father of the plaintiffs. On appeal it was decided that the purchaser could get possession of the house subject to the shares of the present defendant and her brother, since they had not been parties to the sale. The purchaser then sued for the determination of his share, and in that suit it was held that the plaintiffs had a share of 131/180 and the defendants had a share of 49/180. The defendant's brother was by that time dead. The heirs of the purchasers now sue for possession of their 131/180 share. The defendant contended that she was a member of an undivided family and had a share in the dwelling house in suit and therefore under S. 4, Partition Act, 1893, she was entitled to have the plaintiffs' share sold to her on payment of the price fixed by the Court. The trial Court held that she was a member of an undivided family and also that the house was a dwelling house, and ordered the plaintiffs to sell her their share in the house for Rs. 291. Both sides appealed to the District Court. The result of the defendant's appeal is immaterial; but the appeal of the plaintiffs succeeded to the extent that partition was ordered and also mesne profits; and it was held that the defendant was not a member of an undivided family and the suit house was not a dwelling house, and therefore the defendant was not entitled to take advantage of the provisions of S. 4, Partition Act. The defendant now appeals.

I need not discuss the question of the house in suit being a dwelling house within the meaning of S. 4, Partition Act, because in my opinion the appeal must fail on the other ground of contention, viz., that the defendant is a member of an undivided family. It is settled law that the expression "undivided family," occurring in S. 4, Partition Act, is not confined to joint Hindu families nor to families of other religions which happen to have adopted Hindu notions of jointness. It includes also Mahomedans who are undivided in the sense with which the expression is used in S. 4. There is some difficulty in the interpretation of that expression and a number of authorities have been quoted to me.

In 30 All 324 (1), the Full Bench held that the object of S. 4 is to prevent a transferee who is an outsider from forcing his way into a dwelling house in which other members of the transferor's family have a right to live, and that the words "undivided family" must be taken to mean "undivided *qua* the dwelling house in question" and to be "a family which owns the house but has not divided it." If these words are taken to be of universal application and to cover every possible case, then they would cover the case of the present defendant who has a right to live in the house, assuming that she is still a member of the family. But the difficulty here is that the defendant has married and is living in her husband's house, and the question is whether she is still a member of an undivided family within the meaning of S. 4. The case of 30 All 324 (1) is not an authority which expressly deals with this point.

Then there is 23 Bom 73 (2). That was a case of a house originally owned by four members of a joint Hindu family in which at various times all the shares of the four members of the family were

1. Sultan Begam v. Debi Prasad, (1908) 30 All 324=5 A L J 352=1908 A W N 126.
2. Vaman v. Vasudeu, (1898) 23 Bom 73.

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sold. At a later stage two of the members of the joint family and the original owners of the house bought their shares back again, though it appears that in spite of the change of ownership at the four previous sales they had remained in actual occupation of the house throughout. One of the original owners who had thus bought back his share applied under S. 4, Partition Act, to buy out the plaintiff in the suit. It was held that he was not entitled to the benefit of S. 4 because at the time of the purchase by the plaintiff the undivided family had ceased to be the owners of the house and the re-purchase by one of the original owners was after the purchase by the plaintiff ; and it was stated that although the original owner had been in actual occupation throughout, still it was ownership and not occupation which determined the applicability of S. 4 of the Act. Strong reliance is placed upon these last words as an authority in favour of the present defendant. But although it was said that the determining principle is ownership rather than occupation and therefore the mere fact of occupation would not determine a right to relief under S. 4, that does not mean that a person who was not in occupation and who had no intention of occupying would be entitled to the benefit of S. 4 merely because he was an owner.

Then there is 12 C L J 525 (3). That was a case brought by certain members of the family who had a share in the dwelling house in question but did not regularly live in the dwelling house. 30 All 324 (1), was referred to with approval, and it was accepted that the words "undivided family" must be taken to mean "undivided *qua* the dwelling house in question." But there again, although this was a case of persons not regularly occupying the house, it was not a case of a person who prima facie has given up all intention of using the house. It is contended that there is nothing in the record of this case to suggest that the defendant has abandoned all intention of living in the house, and that the mere fact of her right to live in the house is enough to entitle her to the benefit of S. 4 of the Act. This ignores the fact that a woman who marries and goes to live in her husband's house prima facie gives up her intention of continuing to reside in her old house, and that, in my opinion, is what makes all the difference between the case with which we are now dealing and the cases on which reliance has been placed. The defendant has prima facie given up all intention of living in the house ; indeed, since she is now married, she is prima facie no longer a member of the family which owned the house. In the absence of a clear authority in favour of the defendant, I am unable to hold that she is entitled to the benefit of S. 4, because in my opinion she is no longer a member of an undivided family with reference to the house in suit.

The appeal therefore fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

3. Kshirode Chunder Ghosal v. Saroda Prosad Mitra, (1910) 12 C L J 525=7 I C 436.

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BEAUMONT C. J. AND MACKLIN, J.

Nadirsha Hormusji Sidhwa—Appellant.

v.

Krishnabai Bala and *another*—Respondents.

First Appeal No. 205 of 1934, Decided on 15th November 1935, from decision of Commissioner for Workmen's Compensation, Bombay, in Appln. No. 206/B-18.

(a) Workmen's Compensation Act (1923), Sch. 2, Cl. 8—"Repairs" include painting of a building.

The word "repairs" in Cl. 8, Sch. 2 includes the painting of the building especially when a building is being re-painted because repainting is necessary. [P 200 C 2 ; P 201 C 1]

(b) Workmen's Compensation Act (1923), S. 2 (1) (n)—Employment—Whether casual or not—Conflicting Indian decisions—Decisions of County Council to prevail—Finding based on evidence as to nature of employment is one of fact and hence not subject to appeal.

There are some cases in which employment is obviously not casual, and other cases in which it is obviously casual. Between these two extremes there are number of debatable judgments of Indian Courts. In such cases the decision of County Court is to prevail. In other words the rule is that where there is any evidence to support the finding of the County Court Judge, or in India the Commissioner, that the employment either is, or is not, casual, then the finding must be treated as finding of fact and is not subject to appeal. [P 200 C 1, 2]

D. N. Bahadurji and *Pochaji Jamshedji*—for Appellant.

S. C. Joshi and *B. G. Modak*—for Respondents.

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Beaumont, C. J.—This is an appeal from an award by the Commissioner for Workmen's Compensation, Bombay. The three contentions raised by the employer upon which the learned Commissioner had to adjudicate, are (1) that the employer, the present appellant, did not employ the deceased who was engaged by one Rama to whom the contract for painting the building had been given for a lump sum; (2) that the deceased Laxman Bala was not a workman because his employment was of a casual nature and he was employed otherwise than for the employer's trade or business; and (3) that he was not a workman according to the schedule because he was not engaged in the construction, repair or demolition of a building, painting not being repair within the meaning of the schedule. On the first point the learned Commissioner held that it was the appellant, and not Rama, who employed the deceased workman. That seems to me to be a pure finding of fact with which we cannot deal in appeal.

Upon the second question, whether the employment was of a casual nature within the definition of S. 2, sub-s. (1) (n) of the Act, the learned Commissioner held that it was not casual. He held that the work on which the deceased was engaged extended over a period of three months and was concerned with the painting and whitewashing of a large house on several floors containing 30 rooms, and he held that the fact that the workman was employed from day to day, and not for the whole job in the circumstances did not render the employment casual. We have been referred to the various decisions on the English Act in which the language is similar. I think that the rule adopted in England is this: that it is impossible to define what casual employment is. There are some cases in which the employment is obviously not casual, and other cases in which the employment is obviously casual. There are a number of debatable cases between those two extremes and the Courts have held that in those debatable cases the decision of the County Court Judge must prevail. In other words, the rule seems to me to come to this: that where there is any evidence to support the finding of the County Court Judge, or in India the Commissioner, that the employment either is, or is not, casual, then the finding must be treated as a finding of a fact, and is not subject to appeal. The present case is clearly within the debatable area, and the Commissioner having come to the conclusion that the employment is not casual, and there being evidence to support that finding, I think we are bound by it, and that it is not necessary to consider whether we should ourselves have taken the same view or not.

In regard to the third question, whether the painting of the house, which was the work on which the deceased was engaged, was "repair" within the meaning of Cl. (viii), Sch. 2, the learned Commissioner held that it was, and I think there was clearly evidence to support that finding. In so far as the question involves the construction of the Act and the schedule, it is one of law, and I entirely agree with the view of the learned Commissioner. I should say that in normal cases the paint of a house becomes part of the structure, and if it falls into disrepair and has to be renewed, I should say that the renewal forms part of the repair of the house or building and that view has now been adopted in England: see (1901) 2 K B 42(1). Mr. Bahadurji for the appellant has argued that "repair" does not include painting, and in support of that argument he relies on Cl. (vii), Sch. 2 which is dealing with ships, and includes loading, unloading, fuelling, constructing, repairing, demolishing, cleaning, or painting any ship. It is argued that, inasmuch as the two words "repairing" and "painting" are included in that clause the legislature must have considered that repairing would not include painting and that therefore the word "repairs" in Cl. (viii) should also be held not to include painting. I see no reason for drawing that conclusion. The legislature may have considered that it was less clear in the case of a ship, than in the case of a building, that repairs would include painting. For the reasons I have given it seems to me to be clear that repair must include renewal of the paint of a building. We are not dealing with a case, which might possibly arise and in which at any rate the point would be more arguable, where a house is being repainted simply because the owner wishes

1. Dredge v. Conway, Jones & Co., (1901) 2 K B 42=70 L J K B 494=17 T L R 355=49 W R 518=84 L T 345.

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to change its colour, and not because the old paint is in a bad state of repair. In the present case the building was being repainted because repainting was necessary. In my opinion that clearly falls within the word "repairs" in Cl. (viii), Sch. 2. I think therefore that the appeal must be dismissed with costs.

Macklin, J.—I agree.

M.D./R.K. *Appeal dismissed.*

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BROOMFIELD AND MACKLIN, JJ.

Govindbhai Lallubhai Patel— Appellant.

v.

Dahyabhai Nathabhai Patel and *others* —Respondents.

First Appeal No. 31 of 1932, Decided on 6th August 1935, from decision of First Class Sub-Judge, Nadiad, in Special Jurisdiction Civil Suit No. 27 of 1928.

(a) Will—Construction—*A* leaving his property first to his senior wife *J*, then to junior wife *S*, then to his daughter *D* and then to sister's son *P* — First three described as heirs one after another — Will giving all rights to heirs which testator possessed, i. e. right to sell gift, mortgage or to do anything they liked—Senior wife *J* held to have taken absolute estate both alienable and heritable—On *D*'s death, *P* held to have no right to succeed to property.

A left his property by his will first to his senior wife *J* as "kul malik", then to his junior wife *S*, then to his daughter *D*, and lastly to his sister's son *P*. The first three were described as heirs of the property one after another and the will provided "I give all my rights to my heirs, which I have in law, namely of managing in any way I please. They, when they get inheritance, have, therefore, full rights of management and none can raise objections. Just as I am enjoying the moveable and immoveable properties as I please, that I have the right to sell gift or mortgage or do anything I please, I give the same rights to my heirs one after another. First to *J*, then to *S* and then to *D*. They may sell, gift mortgage or do anything they like and none can object to it. So long as the three heirs one after the other are alive, *P* has no right to the properties except those given to him. He gets the right after all the three are dead, *S* died during the lifetime of *J*. This property was enjoyed by *J*, then by *D*. On *D*'s death *P* claimed the property under the will:

Held: that under the will *J* took an absolute estate both alienable and heritable and that on *D*'s death, *P* had no right to succeed to the property under the will: 2 *I A* 7 (*P C*); 35 *Cal* 896 (*P C*); 22 *Bom* 409; 24 *Bom* 420; 1923 *Bom* 216 and *S. A. No.* 557 of 1924, *Disting.* [P 202 C 1, 2; P 206 C 1]

(b) Will—Construction—Unambiguous dispositive words are not to be controlled by general expression of intention.

Unambiguous dispositive words in a will are not to be controlled or qualified by any general expression of intention: 24 Cal 834 (*P C*), *Rel. on.* [P 204 C 2]

(c) Will—Construction — Absolute estate cannot be cut down to life estate merely by gift over of residue.

An absolute estate may be made defeasible in certain circumstances, but it cannot be cut down to a life estate merely by a gift over of the residue. The use of the word 'malik' is ordinarily sufficient to connote an estate both heritable and alienable even in the case of a Hindu widow. "Waras" or heir has the same connotation: 1921 *Bom* 262; 1929 *P C* 283; 24 *Cal* 834 (*P C*); 30 *All* 84 (*P C*); 24 *Bom* 420; *Perry* v. *Merritt*, 18 *Eq* 152; *In re Percy: Percy* v. *Percy*. 24 *Ch D* 616; 1916 *Cal* 775 and 1919 *Cal* 847, *Ref.* [P 204 C 2]

(d) Bombay Bhagdari and Narwadari Act (5 of 1862), Ss. 3 and 5 — Recognised subdivision means sub-division recognised by Government.

The 'recognised sub-division' in the Act means a sub-division recognised by the Government. The Government and no other authority is to determine the bhags and sub-divisions thereof: 8 *Bom* 596, *Rel. on.* [P 206 C 2]

(e) Possession—Suit for—Person who has lost possession suing to recover it cannot rely on prior possession unless it amounts to prima facie evidence of title—He must prove both title and possession—It is open to person in possession to disprove plaintiff's title.

Possession by itself may in some cases be sufficient to relieve the person who is or has been in possession, from the necessity of proving his title. The principle applies to suits in ejectment although it has a very limited and occasional operation. [P 208 C 2]

But where a person, who has lost possession, sues, to recover it, he cannot rest upon his prior possession alone, unless it was such as to amount to prima facie evidence of title. Both title and possession have to be proved in such a case. No doubt the presumption that title goes with possession, under S. 110 of Evidence Act, may come to the assistance of a person who has had possession but has lost it; it is open to the defendant who is in possession at the date of the suit to disprove the plaintiff's title; if the plaintiff's title is disproved, he cannot succeed on the basis of his possession only: 15 *Bom L R* 445 (*P C*); 16 *Cal* 473; 1914 *P C* 1 and 1916 *P C* 21, *Rel. on.* [P 208 C 2 ; P 209 C 1]

M. R. Jayakar and *P. A. Dhruwa*—for Appellant.

G. N. Thakore and *U. L. Shah* — for Respondents.

Broomfield, J. —Desaibhai Jivabhia, the maternal uncle of the plaintiff, had a one-third share in a recognised subdivision (eleven annas eleven pies) in the Narwadari village of Ode in the Anand taluka. He made a will on 5th September 1891, leaving his property, which was

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partly narwa and partly non-narwa (sanadia), first to his senior wife Jhaver, then to his junior wife Saker, then to his daughter Divali, and finally to the plaintiff. Jhaver inherited and, after, her Divali, Saker having died before Jhaver. (Actually it seems there were two wives named Saker; the first one died before the testator). Divali died on 27th January 1918, and on her death, according to the finding of the trial Judge, plaintiff was for a time in possession of the estate or part of it. The defendants, who were co-sharers with Desaibhai in the recognised sub-division of the narwa, but are not his heirs nor the heirs of Divali, deny that plaintiff got possession and claim to have been in possession themselves. They have admittedly had possession at any rate from 1921 of all the property left undisposed of by Jhaver and Divali except one house, lot No. 193 in suit, which is with the plaintiff. Plaintiff sues to recover possession from them relying firstly on his title under the will and alternatively on his possession after Divali's death. The suit was filed first in the Umreth Subordinate Judge's Court in 1925 but was returned for presentation to the Subordinate Judge's Court at Nadiad. The plaint was filed there on 30th September 1928.

The trial Court has found on the construction of the will that Jhaver took an absolute estate, that Divali succeeded as her heir and that the plaintiff takes nothing, he not being Divali's heir; secondly that in any case the will could not affect narwa property owing to the provisions of the Bhagdari and Narwadari Act 5 of 1862; and thirdly, that plaintiff's temporary possession under the circumstances in which it was obtained gives plaintiff no right to evict the defendants. The suit was accordingly dismissed. We hold that the findings of the lower Court on all these points are substantially correct.

The first point to be considered is that of the construction of the will. The provisions which are material for our purpose are the following:—

> After my death I make my first and senior wife Jhaver as kul malik of all my properties because she is advanced in age and has good understanding and so she is not such as to waste away or cause loss to my estate unnecessarily. Hence Jhaver should take all my properties into her possession and management after my death and should do its vahivat in right of khas ownership.

Then follow a number of legacies mostly to charities but including a gift of land to the plaintiff. Provision is also made for the maintenance of the testator's step-mother and of Saker and Divali during the lifetime of Jhaver. The next material provision is clause 12:

> My wife Jhaver is old. Hence after her death I make my second wife Saker the heir of the properties that remain and after her death I make my widowed daughter Divaliba the heir of all the properties that remain. These three are the heirs of my properties one after the other and they are entitled in law to inherit my properties. Hence I, of my free will, make them my heirs one after the other. As they go on getting inheritance they should take my properties in their possession and manage the same as they please. That is, I give all my rights to my heirs which I have in law, namely of managing in any way I please. They, when they get inheritance have therefore full right of management and none can raise objections.

Then it was provided that if a son should be born to the testator, he was to be the owner of all the properties except those given by way of legacy. Then follow Cls. 14, 15 and 16, all of which are important;

> (14) On the death of one after the other of the heirs abovenamed or one predeceasing the other, the rest should inherit according to their turn and take the property in management and perform funeral ceremony of the dead according to the custom.
>
> (15) Just as I am enjoying the abovementioned moveable and immoveable properties as I please, that is as I have a right to sell, gift, mortgage or do anything I please, I give the same rights to my heirs one after the other, that is first to Jhaver, then to Saker and after that to Divaliba. They may sell, gift, mortgage or do anything they like and none can object to it.
>
> (16) After the death of all these three heirs named by me Govindbhai Lallubhai, son of my true sister (i. e., plaintiff), should perform the funeral ceremonies of the last heir and should take the remaining properties in his possession and enjoy it in right of inheritance. He should perform my annual shraddha. So long as the three heirs, one after the other, are alive Govindbhai has no right to the properties except those given to him. He gets the right after all the three are dead.

The argument of the learned counsel for the plaintiff is as follows. He admits that the language used in respect of Jhaver, if it stood by itself, would confer absolute ownership upon her. But he says a contrary intention is expresesd later when Sakerba, Divali and plaintiff are made heirs in succession to her. Therefore the testator cannot have intended to give an absolute estate. The only way in which these persons could inherit one after the other is if a succession of life estates was intended. It was

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not the dominant idea of the testator. Mr. Jayakar says, that each of the persons named should have an absolute estate in the strict legal sense which would import that the estate would pass to the heirs of Jhaver. Regard must be had to the notions of Hindus. The plaintiff was the only male person in whom the testator was interested. There is evidence that he brought the boy to stay with him. He would not be likely to give an absolute estate to his widows, and as for Divali, she was a widow herself and had no children so that on her death the estate would go to her husband's relations.

Mr. Jayakar urges that his construction of the will as giving merely a life-interest in the property to the widows and daughter of the testator and ultimately giving the estate absolutely to the plaintiff gives effect to all the provisions of the will. If that is the correct view of the testator's intention, then it is argued that the law will give effect to it. The cases cited in this connection were 2 I A 7 (1); 35 I A 118 (2); 22 Bom 409 (3); 24 Bom 420 (4); 25 Bom L R 189 (5) and an unreported case S. A. No. 557 of 1924 (6). These authorities, in my opinion, do establish this, viz. that where it is clear, on reading the instrument as a whole that the testator intended an absolute gift over after a life estate or series of life estates, then that intention will be given effect to in spite of the fact that the language used would ordinarily, that is apart from the contrary intention appearing from the context, have sufficed to confer an absolute estate on the person taking in the first instance. Those taking the estate ultimately will then get a vested interest at once. The cases cited by the learned counsel for the respondents in this connection, 35 I A 17 (7); 49 I A 1 (8); 49 I A 129 (9); 49 I A 25 (10) and 24 I A 76 (11) contain nothing inconsistent with this proposition, since what is laid down in those cases as to the nature of the estate taken by a Hindu widow is all subject to the condition that a contrary intention does not appear from the context.

The question is whether there is anything in the context of this will which qualifies the words importing an absolute grant in the case of Jhaver and Divali, and cuts their interests down to a life estate. Leaving out of account the provision in favour of a son, since in fact no son was born or adopted, I do not think it can be seriously contended that the widows and the daughter were intended to have merely a life interest and plaintiff a vested interest in the whole estate. Apart from the improbability of the testator intending that the estate of his daughter Divali should be thus limited (daughters in Bombay taking absolutely as heirs), the power of alienation is conferred upon each of the persons named in the clearest possible terms, and it is also expressly provided that what each successive heir after Jhaver is to get is merely the residue and not the estate as a whole. In fact, I think, Mr. Thakore is right when he says that what the testator purported to do was not to create a series of life estates—a life estate with unrestricted power of disposal is a contradiction in terms—but a series of absolute estates. The only limitation of the estates of the widows and daughter, which can be said to be indicated at all, is that the succession was to be as dictated by the testator, that is to say their estates were not to be heritable estates. But if that was the testator's intention, it appears to me that it cannot be given effect to. There is as far as I am aware, no clear authority for holding that a will of this nature may be construed as conferring merely a life interest on the person first designated as absolute owner.

1. Mahomed Shumsool v. Shewukram, (1876) 2 I A 7=14 Beng L R 226=3 Sar 405 (P C).
2. Radha Prosad Mullick v. Ranimoni Dassi, (1908) 35 Cal 896=35 I A 118=12 C W N 729 (P C).
3. Lallu v. Jagmohan, (1869) 22 Bom 409.
4. Chunilal v. Bai, (1899) 24 Bom 420=2 Bom L R 46.
5. Mulchand v. Bai Rukshmani, 1923 Bom 216 =72 I C 282=25 Bom L R 189.
6. Shukla Balashankar Premshankar v. Bai Punji, Second Appeal No. 557 of 1924 decided on 17th March 1927 by Crump and Baker, JJ.
7. Surajmani v. Rabi Nath Ojha, (1907) 30 All 84=35 I A 17=5 A L J 67 (P C).
8. Bhaidas Shivdas v. Bai Gulab, 1922 P C 193 =65 I C 974=49 I A 1=46 Bom 153 (P C).
9. Ramachandra Rao v. Ramachandra Rao, 1922 P C 80=67 I C 408=49 I A 129=45 Mad 320 (P C).
10. Sasiman Chowdhurain v. Shib Narayan Chowdhury, 1922 P C 63=66 I C 193=49 I A 25=1 Pat 305 (P C)
11. Lalit Mohun Singh Roy v. Chukkun Lal Roy, (1897) 24 Cal 834=24 I A 76=7 Sar 155 (P C).

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In 2 I A 7 (1) the testator left his property to his son's widow who was described as heir and malik, and after her death there was a gift over to the daughters. It was held that the gift over to the daughters displaced the expressions indicative of an absolute grant to the son's widow and that she took only a life estate. As to this case it is to be noted that the will did not give the widow the power of alienation, and it was held that she had no such power. In 35 I A 118 (2), a gift to the testator's daughters was held to convey merely a life interest by reason of a gift over to the daughters' sons. But here there were no very clear words indicating an absolute gift to the daughters and the provision in favour of the sons was contained in the same sentence. The case on which Mr. Jayakar has relied perhaps, more than on any other, is 22 Bom 409 (3). The testator in that case had made the following will:

> When I die my wife named Suraj is owner of that property. And my wife has powers to do in the same way as I have absolute powers to do when I am present, and in case of my wife's death, my daughter Mahalaxmi is owner of the said property after that.

It was held that Suraj took only a life estate with remainder over to Mahalaxmi after her death. But, as pointed out by Macleod, C. J., in 25 Bom L R 189 (5), this case was decided before 35 I A 17 (7), had overruled the view previously current in Bombay, that there is a presumption that a widow is not intended to have the power of alienation. Therefore in 22 Bom 409 (3), the Court might not have held that the widow had an absolute estate anyhow even apart from the gift over. The same considerations apply to 24 Bom 420 (4), which merely followed 22 Bom 409 (3). As for 25 Bom L R 189 (5), the gift over in that case was to the testator's son, and that was the circumstance on which the Court mainly relied in holding that the widow was intended to have a life interest only. In the unreported case it was possible for the Court to hold, and it did hold, that the widow had not been given the power to alienate. All these cases therefore are distinguishable from the present, for here there cannot be the slightest doubt as to the power of disposal. It is true that the testator says, referring to Jhaver, that she was advanced in age and of good understanding and not such as to waste away or cause loss to the estate unnecessarily. But this at most is no more than a pious wish that the estate should be kept intact as far as possible. Unambiguous dispositive words in a will are not to be controlled or qualified by any general expression of intention: 24 I A 76 (11). Moreover, in Divali's case there are no similar words. I think it is impossible to argue on the construction of this will that the plaintiff got a vested interest. The most he was intended to get was the residue, if any, remaining undisposed of after Divali's death. Now an absolute estate may be made defeasible in certain circumstances (there is for instance, S. 131, Succession Act; see also 23 Bom L R 433 (12); but it cannot be cut down to a life estate merely by a gift over of the residue. In 56 I A 372 (13), their Lordships say (p. 377):

> Attempts on the part of a testator in India to restrict devolution of properties which he bequeaths to a legatee absolutely and to prevent alienations of such properties are quite common, and wills containing such provisions have often come up for decision before the Board. The question for determination has always been whether there are dispositive words creating an estate of inheritance in the first instance; and, if so, whether the subsequent restrictive clauses are sufficient to displace the effect of such dispositive words or whether such subsequent clauses are merely repugnant to the absolute estate.

In that case the estate in question was in terms declared to be a heritable estate and their Lordships held that the restrictions on alienation imposed by the testator were void as repugnant to the absolute estate conferred. Here we have what is really the converse case. The estates conferred on Jhaver and Divali were clearly alienable estates. Can it be held that they were not also heritable estates? The Privy Council has decided, in 24 I A 76 (11) that the use of the word "malik" is ordinarily sufficient to connote an estate both heritable and alienable even in the case of a Hindu widow, "Waras" or heir has the same connotation: 24 Bom 420 (4). Mr. Jayakar has admitted that the language used in this will would suffice to confer such an estate both on Jhaver and Divali, but he urges that this language is controlled by the gift over to the plaintiff after Divali's death. It may be argu-

12. Bai Dhanlaxmi v. Hariprasad, 1921 Bom 262=62 I C 37=45 Bom 1038=23 Bom L R 433.
13. Raghunath Prasad Singh v. Deputy Commissioner, Partabgarh, 1929 P C 283=120 I C 641=56 I A 372=4 Luck 483 (P C).

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able that the various Privy Council rulings still leave it open to the Court to hold that if the intention that an estate should be alienable but not heritable be sufficiently clearly expressed, it might be given effect to, but I cannot think that the argument is sound. For what would be the meaning of a restriction which could be immediately and completely defeated by the exercise of the power of alienation ? It seems to me that such an interference with the normal course of devolution of the estate, or rather of the residue thereof, if any, would be just as much repugnant to the absolute character of the estate conferred as any restriction on the alienation of a heritable estate.

Mr. Thakore referred us to two English cases 18 Eq 152 (14) and 24 Ch D 616 (15). In the former case, where the whole residue of the testator's personal estate was given to his wife for her own absolute use and benefit, a gift over after her death was held void as too indefinite and repugnant to the power of disposition given to her. In the latter case a gift of £10,000 was held to confer an absolute interest in spite of a gift over. Mr. Jayakar points out that these cases, and also the previous authorities referred to in them, were cases of gifts of personalty, and argues that in the case of realty the rule would be different. He cited (1877) 6 Ch D 1 (16) where the facts were these: The testator gave his real and personal estate to his brother *J* with full power to sell and dispose thereof by deed, writing, will or otherwise; but in case *J* should not dispose of the said real and personal estate, or any part thereof, he gave the same, or such part thereof as he should not dispose of to *J H* for life, with remainders over. The testator also made various dispositions with special reference to the alternative of the survivorship of himself or *J*. *J* died in the testator's lifetime. The Court of first instance held that the gift of the real and personal estate to *J* was an absolute gift, but on appeal it was held, reversing this decision, that taking into consideration the whole will, the gift to *J* must be read as a gift to him for life with an absolute power of appointment, and with a gift over if *J* should die before the testator, or if he should survive but not dispose of the estate; and that in the event which had happened the gift over was valid. In my opinion this case does not really assist Mr. Jayakar's argument. The general rule, as stated both by James, L. J., and Baggallay, is very definitely against him. Thus James, L. J., observed (p 14) :

It is settled by authority that if you give a man some property, real or personal, to be his absolutely, then you cannot by your will dispose of that property which becomes his. You cannot say that, if he does not spend it, if he does not give it away if he does not will it that which he happened to have in his possession, or in his drawer, or in his pocket at the time of his death, shall not go to his heir at law if it is realty, or to his next of kin if it is personalty, or to his creditors who may have a paramount claim to it. You cannot do that if you once vest property absolutely in the first donee. That is because that which is once vested in a man, and vested de facto in him, cannot be taken from him out of the due course of devolution at his death by any expression of wish on the part of the original testator.

Similarly Baggally, L. J., after referring to the clause in the will "provided he shall not dispose of my said real and personal estate, or any part thereof as aforesaid," observed as follows (p. 18) :

Now I quite agree that if that proviso was only to take effect in the event of the brother surviving the testator, and not disposing of the property pursuant to the power previously given to him, the proviso would be repugnant, and might be rejected on that account.

In the particular circumstances of that case it was held that the rule did not apply. The first donee died before the testator and the original gift never took effect at all. Moreover the testator had contemplated that it might be so and had made various dispositions to come into effect in that event including the appointment of executors. It was therefore held that the will read as a whole was inconsistent with an absolute gift to the testator's brother, and also inconsistent with the notion that the testator was only dealing with what his brother had left undisposed of. In the case with which we are concerned, however, I can see no similar reasons for holding that the general rule laid down by their Lordships in 6 Ch D 1 (16) should not apply. Mr. Thakore cited Indian cases on the

14. Perry v. Merritt, (1874) 18 Eq. 152=43 L J Ch 608=22 W R 600.
15. *In re* Percy: Percy v. Percy, (1883) 24 Ch D 616=53 L J Ch 143=49 L T 554.
16. *In re* Stringer's Estate Shaw v. Jones-Ford, (1877) 6 Ch D 1=46 L J Ch 633=25 W R 815=37 L T 233.

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same point. In 20 C W N.463 (17), it was held that where a devisee takes an absolute interest, a gift over on his failure to dispose of the property, or of whatever part of the property he does not dispose of, is void. This was followed in 30 C L J 51 (18). In these cases the rule was applied to real estate. By way of conclusion to this part of the case I may quote the observations of Lord Davey in 24 I A 76 (11) :

> It is possible that a testator may have imperfectly understood the words he has used, or may have misconceived the effect of conferring a heritable estate, but this would not justify the Court in giving an interpretation to the language other than the ordinary legal meaning.

I think the trial Judge's view that Jhaver took an absolute estate both alienable and heritable is right though the authority on which he mainly relies, 49 I A 1 (8), is hardly relevant to the present case. Next there is the point that the alienation in favour of plaintiff is void under the Bhagdari and Narwadari Act. The relevant sections for our purpose are Ss. 3 and 5 which are as follows :

> *Section* 3.—It shall not be lawful to alienate, assign, mortgage or otherwise charge or incumber any portion of any bhag or share in any bhagdari or narwadari village other than a recognised sub-division of such bhag or share, or to alienate, assign, mortgage or otherwise charge or incumber any homestead, building-site (gabhan) or premises appurtenant or appendant to any such bhag or share or recognised sub-division, appurtenant or appendant thereto apart or separately from any such bhag or share, or recognised sub-division thereof.

> *Section* 5.—Nothing in this Act contained shall be construed as prohibiting the alienation, assignment, mortgaging, charging or incumbering any bhag or share, or recognised sub-division of any bhag or share, in any such village as aforesaid, conjointly and in the gross with its homestead, building-site (gabhan) and other proper appurtenances, if such alienation, assignment, mortgage, charge or incumbrance be in other respects warranted by law, the object and intention of this Act being to prevent the dismemberment of bhags or shares or recognised sub-divisions thereof, in bhagdari or narwadari villages, and also to prevent the severance of homesteads, building-sites (gabhan) or other premises, appurtenant or appendant to bhags or shares, or recognised sub-divisions of bhags or shares, from the same or any of them.

The learned counsel for the plaintiff admits that the will is an alienation, but argues that Desaibhai had a distinct and separate interest which should be regarded as a recognised sub-division within the meaning of the Act. The facts on which he relies are these. In 1872 Jethabhai Nathabhai, Nathabhai Mathur and Desaibhai, Jiwabhai representing three branches of the narwadari family, partitioned their houses and house sites among themselves. In 1880 they also partitioned some of their lands, not by metes and bounds, but by an arrangement dividing the rents paid by the tenants. In 1893 when Nathabhai Mathur died, the names of his widows were entered in the narwa khata along with those of Desaibhai and Jethabhai.

In the same year Dahyabhai who is defendant 1 in the present suit, was adopted by one of these widows. Desaibhai objected to the adoption and filed a suit to contest its validity. The Court held that the adoption was valid and that the three persons Nathabhai Mathur, Desaibhai Jivabhai and Jethabhai Nathabhai were separate and had a distinct and separate interest in the property. The judgment in that suit is Ex. 206. Mr. Jayakar's contention is that as Desaibhai dealt in his will with the whole of his interest, which has been recognised by the Court as a separate share and which would have gone to his widows and heirs apart from the will, there has not in fact been any dismemberment of the narwa which is what the Act is intended to prevent. That had already happened long before. That is the argument. But what had happened before was a private arrangement among members of the narwadar family. The assignment of Desaibhai's interest to the plaintiff can hardly stand on the same footing, for he is not a narwadar. Moreover, apart from that, I think there can be no doubt that "recognised sub-division" in the Act means a sub-division recognised by Government. There is no definition of the term, but the origin of these tenures—as to which, see 4 Bom 367 (19) and the fact that the liability to pay the Government assessment is imposed upon recognised shares point to the conclusion that Government and no other authority is to determine the bhags and sub-divisions thereof.

17. Sures Chandra Palit v. Lalit Mohan Dutta, 1916 Cal 775=31 I C 405=22 C L J 316=20 C W N 463.
18. Sulochana v. Jagattarini, 1919 Cal 847=53 I C 602=30 C L J 51.
19. Dolsang Bhavsang v. Collector of Kaira, (1879) 4 Bom 367.

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There is authority for this view in 8 Bom 596 (20). It was held in that case that a bhag means an aliquot share of a village subject to an aliquot portion of the total land-tax imposed on it and not any sub-division by partition or otherwise. It is an admitted fact that the Government records show annas eleven and pies eleven as a recognised sub-division, and no shares in that sub-division have so far been recognised by Government. The gift of a share therein to plaintiff would, therefore, be an alienation prohibited by the Act. It follows that even if plaintiff got an interest under the will, it could give him no title to the narwa land in suit. Then we come to the point of plaintiff's alleged possessory title. Mr. Jayakar's argument on this issue is as follows. If the will was invalid, it should have been challenged within six years or twelve years at most. It is now too late to challenge the alienation as the period of limitation expired at latest during the life of Divali. Plaintiff went into possession in 1918 when his name was entered in the records and he began to collect rent. He was dispossessed in 1922, the dispossession being finally confirmed in 1924. The present suit was brought originally in 1925. So Mr. Jayakar says, the plaintiff got into possession under a prima facie title and was dispossessed by mere trespassers. Therefore he is entitled to be restored to his possession unless the defendants can prove a superior title. But the defendants have none. Plaintiff is entitled to hold possession until evicted by the rightful heir or by Government. Mr. Jayakar does not say that he can tack his possession on to that of the widow and daughter of the testator, but he does argue that his case is strengthened by what he calls the continuous dispossession of the true owner.

Now Jhaver as Desaibhai's widow would of course have got the estate anyhow as his heir, and Divali would have succeeded anyhow as Jhaver's heir or as the heir of the testator. But Mr. Jayakar relies on the fact that they both carried out the provisions of the will, the lands directed to be given as legacies to charitable institutions were given; plaintiff himself got his legacy of twenty bighas; various mortgages were effected by Jhaver and Divali. The defendants were aware of this and did not protest. After Divali's death plaintiff's name was entered in the mutation register of the Record of Rights on 21st February 1918 (Ex. 216); he was shown as the heir of Divali. There is nothing in the register to indicate that any inquiry took place and in fact the plaintiff has admitted that there was none. But he says that defendant 1 was the Ughratdar or Revenue Patel at the time and knew all about it. In April 1918, the Talati proposed that plaintiff's name should be entered as Divali's heir in the Warsa Patrak or heirship register (Ex. 120.) In his proposal he referred to the will and stated that plaintiff was in possession. The mamlatdar, however, disagreed with this recommendation; and his order, with which the Deputy Collector concurred, was that plaintiff's name could not be entered and that Divali's name must be deleted. The Mamlatdar's order was on 8th June 1918, that of the Deputy Collector on 2nd March 1919. Plaintiff made an application to the collector. That officer's reply is Ex. 57, dated 10th October 1919. The plaintiff was informed

> that he not being a member of the narwadar family his name cannot be entered in the place of the deceased narwadar. This, however, will not prejudice his actual possession of the land.

However the plaintiff carried his appeal to Government, and ultimately on 2nd June 1922 his name was entered in the narwa khata (Ex. 149). In the meantime on 23rd August 1921, defendant 1 made an application, which is contained in Ex. 229, complaining that although he himself was in possession of Divali's land the plaintiff's name had been wrongly entered. The Mamlatdar inquired of the Talati how it happened that plaintiff's name was entered, and the Talati reported on 24th September 1921, that the lands had been entered in plaintiff's name in place of Bai Divali as heir on the authority of the will produced by him, but on inquiry the said lands were found to be in the possession of the applicant, i. e., defendant 1. Thereupon an inquiry was held by the Mamlatdar. The tenants and the Matadars supported defendant 1, and on 15th June 1922, the Mamlatdar decided against plaintiff whose name was ordered to be removed from the Record of Rights. The Takrari Register containing the details of the inquiry is Ex. 72. Plaintiff appealed to the

20. Gulab Narotam v. Secy. of State, (1884) 8 Bom 596.

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Deputy Collector, but his appeal was dismissed on 5th November 1922. He then appealed to Government, but also without success. The Government resolution finally disposing of the matter is Ex. 230. In consequence of this decision the plaintiff's name was removed from the narwa khata also. Mr. Jayakar contends that the plaintiff was in possession of the estate from 1918 to 1921. But at the beginning of 1921 his rent-notes were lost or stolen, and that enabled the defendants to win over the tenants and get plaintiff's name deleted from the record by false evidence. In January 1921, it appears the plaintiff did publish a notice (Ex. 89) stating that some rent-notes had been taken from his house by somebody, and offering a reward of Rs. 25 for their return. He afterwards sent notices to the tenants calling on them to pay rent and referring to the loss of the rent-notes, and he brought a couple of assistance suits. But the tenants did not pay. The assistance suits were dismissed and plaintiff did nothing more until he filed this suit. It is desirable, I think, to state what exactly the trial Judge's findings are as to the fact of plaintiff's possession. He says at p. 11 of the print :

> It is clear that plaintiff somehow or other got into possession and got his name entered in the Record of Rights on the strength of the will of Desaibhai.

Again at p. 13 :

> After the death of Divali plaintiff began to take rents from some tenants. It is not that all the tenants attorned to the plaintiff. There was no question of taking rent-notes immediately after the death of Divali. He might have been successful even in taking some rent-notes from the tenants later on in July, but when the question of entry of his name in the narwa khata cropped up the narwadars objected and the fight began.

Later, on the same page he says :

> The conduct of both the parties proves that plaintiff was in possession in Somvat 1974 (1918 A. D.) of some lands but was not in possession thereafter.

At p. 14 he says :

> The result is that plaintiff was in possession of some lands after the death of Divali for some time, but the defendants anyhow won over the tenant.

Finally summing up at p. 18 he says :

> In the present case I have already held that plaintiff might have got possession of some of the lands and taken rent-notes of the same. Plaintiff could not get possession of the lands which were joint nor of the property which was in possession of the mortgagees. I have also found that plaintiff was in possession of some lands only for a year. It has further been found that plaintiff did not peaceably enter into possession, and since his name was entered in the mutation register there was a dispute about his title to the land.

These findings are very tentative and indefinite. The learned counsel for the plaintiff taking it that it has been held in his favour that plaintiff was in possession for a time, at any rate, after Divali's death (he says it was for three years and not one) contends that on the authorities his client is entitled to evict the defendants who have dispossessed him without any title. They are, he says, no better than trespassers, and possession is a good title against all persons except the rightful owner. We have had the benefit of a very full and learned argument at the Bar on this as on other points in the case. If I do not propose to refer in detail to the authorities it is not out of any disrespect to the arguments of learned counsel but because on the view which we take of the facts no question of law arises on this part of the case. That possession by itself may in some cases be sufficient to relieve the person who is or has been in possession from the necessity of proving his title, is a proposition which I think cannot be disputed : see 6 Bom 215 (21), 20 I A 99 (22) and 25 Bom 287 (23). These were not actually suits in ejectment, but the doctrine has been applied to suits in ejectment : 8 Bom 371 (24), 5 Bom L R 264 (25) and 10 Bom L R 571 (26). It would seem however that in such cases it can have only a very limited and occasional operation. In spite of some dicta in a few of the cases to which we have been referred, which may seem to indicate a different view, I take the law to be this. (I am not speaking of possessory suits under S. 9, Specific Relief Act, which are in a special category and which of course must be brought within six months of dispossession.)

When a person who has lost possession sues to recover it, he cannot rest upon

21. Pemraj Bhavaniram v. Narayan Shivaram, (1882) 6 Bom 215 (F B).
22. Ismail Ariff v. Md. Ghouse, (1893) 20 Cal 834=20 I A 99=6 Sar 305 (P C).
23. Hanmontraw v. Secy. of State, (1900) 25 Bom 287=2 Bom L R 1111.
24. Krishnarao Yeshvant v. Vasudev Apaji, (1884) 8 Bom 371.
25. Ali v. Pachhubibi, (1903) 5 Bom L R 264.
26. Bhagwan Sing v. Secy. of State, (1906) 10 Bom L R 571.

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his prior possession alone unless it was such as to amount to prima facie evidence of title. For both title and possession have to be proved in such a case: 15 Bom L R 445 (27), 16 I A 23 (28), 42 Cal 384 (29), also 43 I A 192 (30). Moreover, although the presumption that title goes with possession (S. 110, Evidence Act) may come to the assistance of a person who has had possession but has lost it, as held in 10 Bom L R 571 (26), it must be open to the defendant who is in possession at the date of the suit to disprove the plaintiff's title. That seems clear from the language of S. 110. If the plaintiff's title is disproved, as in the present case we hold that it is, he cannot succeed on the basis of his possession only. The facts that plaintiff in this case has admittedly been out of possession for several years and that defendants, who have admittedly had possession at any rate from 1921, have succeeded in showing that he has no title, are enough, in my opinion, to distinguish all the cases on which Mr. Jayakar has relied. There is an additional point, though I am not sure that it makes much difference in principle. It does not appear that either under the Bhagdari and Narwadari Act or otherwise, the defendants have any right to possession of the estate of Desaibhai. Nevertheless they were co-sharers with Desaibhai in the narwa, and the interests of the narwadars, who are responsible for the payment of the assessment, may be said to be affected by alienations of unrecognized sub-divisions. The defendants can hardly therefore be regarded as mere trespassers. For these reasons, I hold that even if plaintiff had proved his possession for three years, it would not have entitled him to evict the defendants in the circumstances of this case.

But as a matter of fact we do not find plaintiff's possession proved. The entries in the records and the orders of the revenue authorities on which Mr. Jayakar has mainly relied, do not really prove that he had actual possession. The fact that the Talati entered his name in the mutation register in February 1918, and proposed to enter it in the warsa patrak in April 1918, mentioning in the latter case that he was in possession, cannot be relied upon, in the face of the Talati's explanation in his report to the Mamlatdar in September 1921, that the entries had been made on the strength of the will and that inquiry had shown that plaintiff was not in possession at all. In that connexion it should be mentioned that the entry in the mutation register was made within a month of Divali's death. At that time, and even in April when the Talati referred to the plaintiff's possession in the warsa patrak, it is hardly possible that there can have been any tangible evidence of a change in the possession of the property to the knowledge of the Talati.

The actual possession of the lands was with the tenants and there would be no question of new rent notes at that time. The rent notes which plaintiff says he took afterwards were not entered in the Talati's tenancy register. Then some of the narwa lands belong to the co-sharers jointly and are managed by a private Talati, who collects the rents and pays to the co-sharers. The private Talati at the material time was one Tribhuvan. He was dead at the time of the suit, but he made a statement in the inquiry held by the Mamlatdar in June 1922, Ex. 196. This statement is a strong piece of evidence against plaintiff, for Tribhuvan said that he had never at any time paid the plaintiff any rent on account of Divali's share in the joint lands but had paid it all to defendant 1. The trial Judge says that this statement of Tribhuvan is inadmissible, though it was in fact admitted in evidence. His reason seems to be that the signature of Tribhuvan is not sufficiently proved by the evidence of his son, Ex. 195. But the document forms part of the revenue inquiry papers, and I can see no reason why the evidence of Tribhuvan's son should not be accepted. He has sworn that the statement bears his father's signature, and in my opinion his cross-examination does not suggest that he was not in a position to identify it. The statement is therefore sufficiently proved and it is admissible as having been made

27. Dharni Kanta v. Gabar Ali, (1913) 15 Bom L R 445=18 I C 17 (P C).
28. Mohima Chundar Mozoomdar v. Mohesh Chundar Neogi, (1888) 16 Cal 473=16 I A 23=5 Sar 321 (P C).
29. Ramchandra Martand v. Vinayak Venkatesh, 1914 P C 1=25 I C 290=41 I A 290=42 Cal 384 (P C).
30. Secy. of State v. Chelikani Rama Rao, 1916 P C 21=35 I C 902=43 I A 192=39 Mad 617 (P C).

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in the course of business or professional duty. The fact that in all these protracted inquiries the plaintiff failed to satisfy the authorities of his possession tells heavily against him, for it clearly appears that if he had possession they were prepared to recognize him.

Mr. Jayakar lays stress on the Collector's letter of October 1919, Ex. 57, by which plaintiff was informed that although his name could not be entered it would not prejudice his actual possession of the land. But I do not think that that means that the Collector was satisfied that he had possession in fact, and even if he was under that impression at that time, the evidence shows that after full inquiry the authorities decided otherwise. Much has been made of the fact that defendant 1 did not complain to the authorities about the entry of plaintiff's name until August 1921. But if he was in possession all along, as he asserted in his application, Ex. 229, his inactivity can hardly be regarded as suspicious. In 1921, plaintiff began sending notices to the tenants and filing assistance suits, and it was that apparently which moved the defendant to take action. Next after the revenue records, Mr. Jayakar relies mainly on plaintiff's account book, Ex 92, which purports to show the receipt of rent from the tenants of separate lands and from the private Talati. But Ex. 92 is only a rough memorandum book in which entries could be made at any time Its appearance is not such as to inspire any confidence and there is no corresponding ledger. Moreover it cannot be said to be properly proved. Plaintiff says that the book is written partly by himself, partly by the Talati Tribhuvan and partly by other persons. Tribhuvan's son, however, deposes that the entries pointed out to him are not in his father's handwriting, and the other persons have not been called. There is no other documentary evidence. Plaintiff's story is that the rent notes were stolen, but I am very sceptical about that. I doubt very much if he ever had any. It would have been a different matter of course if there had been any reference to the rent notes in the tenancy register.

Then there is the oral evidence. A large number of witnesses have been examined but they do not include any of the tenants. The tenants whose names have been mentioned by plaintiff have been called by the defendants and they repudiate the plaintiff's case. The suggestion is that they are colluding with the defendants, which I suppose is possible, but does not seem at all probable. The plaintiff's witnesses are mostly people who say they were called to write rent notes for him. Some depose to the payments of rent by such and such a tenant, on a single occasion mostly. Some support specific entries in the plaintiff's accounts. The most important perhaps is Bhikabhai, Ex. 119. He was the Ugharatdar or Revenue Patel. But his statement that plaintiff was in possession and was recovering rent is flatly contradicted by a statement which he signed as one of the Matadars in the inquiry before the Mamlatdar in May 1922, Ex. 121. The learned trial Judge was obviously not much impressed by the evidence of these witnesses. I think myself it is worth little or nothing. The defendant examined many of the tenants and produced the rent notes. They have also produced account books, though at a late stage of the case These books were brought by Tribhuvan's son. and as they were produced late, were apparently not admitted in evidence. But it was obviously the plaintiff's duty to produce the books kept by the joint Talati.

The trial Judge thought that the defendants' evidence was most unsatisfactory. In my opinion it is better than the plaintiff's evidence anyhow, and the force of the learned Judge's criticism is very much weakened by the fact that he thought that defendants had not produced their rent notes in the revenue inquiry. It seems quite clear that they did (see the Talati's report in Col. 6 of the Takrari register Ex. 72). Anyhow, of course, the plaintiff must prove his case and cannot rely on the weakness of the defendants' evidence. I am not satisfied that the plaintiff ever got real or effective possession. The evidence proves no more than an unsuccessful attempt to obtain it. The result of our findings is that the appeal fails and must be dismissed with costs. This is subject to one small exception. In our opinion the plaintiff is entitled to the declaration and injunction which he asks for in respect of house lot No. 193, which had admittedly been in his possession at any rate from

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the time of Divali's death. The evidence does not appear to make it clear that this house forms part of the narwa property. Even if it does, the defendants have not been able to show that they have any right to it. If the plaintiff were evicted he could sue to recover possession under S. 9, Specific Relief Act and would be entitled to recover without proof of his title.

That being so, we declare that plaintiff is entitled to the possession of this house lot No. 193 as against the defendants, unless and until they establish their right to it in due course of law. We also grant an injunction restraining the defendant from interfering with plaintiff's possession until such time. This is a minor point which should not affect the costs of the appeal. There are cross-objections by the defendants in respect of the order made by the trial Judge as to the costs in his Court. He has ordered the parties to bear their own costs. Learned counsel for the defendants contends that in view of the findings of this Court costs should follow the event according to the ordinary rule. It appears to us, however, that probably this litigation would never have arisen but for the ambiguity of the provisions of the will. The difficulty in the construction of the will has been caused by the language used by the testator himself. Moreover, as the defendants have been in possession for a number of years, of property to which apparently they are not entitled, we see no reason why they should not be ordered to pay their own costs. The trial Court's order as to costs will therefore stand. The cross-objections are dismissed with costs.

Macklin, J.— I agree. The main questions for consideration in this case are whether the plaintiff has proved his title to the property in suit by reason of the will, or in the alternative whether he has proved a title by reason of his having been in possession of the property. The will gives an estate to two women, Jhaverba and Divaliba and then an estate to the plaintiff, and it is Mr. Jayakar's contention that upon a true construction of the will the estates to the two women are no more than life estates. He relies first upon 2 I A 7 (1), and upon 35 I A 118 (2), where it was held that in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. But the rule laid down in these two cases is subject to a further rule laid down in 35 I A 17 (7), that the mere fact of the legatee being a woman who does not ordinarily take an absolute estate, is not enough to cut down the full rights that the word "malik" confers. Those rights can be cut down only if there is something in the context of the will itself which clearly qualifies the use of the word. This proceeds from the ordinary rule of construction that clear and unambiguous dispositive words ought not to be controlled or qualified by any mere general expression of intention, and that technical words or words of known legal import, for example "malik," must have their legal effect, unless there are such inconsistent words in the will as would make it clear that the testator did not intend to use in their technical sense words which happened to be technical words.

Mr. Jayakar then cited certain cases in which the facts are superficially similar to the facts of the present case, and where words which appeared at first sight to confer an absolute estate were taken as conferring only a limited estate. But it is evident that every will must be construed by itself on its own merits, and that two wills which read as a whole may appear to be superficially similar in their terms may, when fully considered, show that the testators had different intentions. In the present will, along with the gift of an absolute estate to Jhaver and Divali is a provision that an absolute estate of what remains of the property shall go to the plaintiff. This last provision is clearly inconsistent with the notion of an absolute estate for Jhaver or Divali since an absolute estate carries with it the right to bequeath it to any one that the owner pleases, or (in the case of intestacy) the right of the heirs to succeed to the estate. The question then is whether the plaintiff's legacy of an absolute estate to take effect after the death of Divali ought to be allowed to show an intention on the part of the testator that the previous estates of Jhaver and Divali were only limited estates. Apart from the inconsistency raised by the provision that the estate in the end must go to the plaintiff I do not think it is possible, on reading the will as a whole, to say that the intention of the testator was not that the

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earlier estates should be absolute estates but that they should be only limited estates.

The women are described as "malik." They are allowed to sell, gift, mortgage, or do anything they like with the property; and after the last of them is dead, what is given to the plaintiff is an absolute estate in what remains. I take this to mean that the testator intended the women in turn to have an absolute estate to deal with as they liked; but that if there happened to be anything left, then they could not dispose of that by a will, but it must go to the plaintiff. I do not take it to mean that they were to have only a life estate which should afterwards go to the plaintiff. In my opinion the use of the expression "what remains of the property" rules out the latter interpretation. Clearly the provision that what remains of the estate will go to the plaintiff is inconsistent with what has gone before, viz., the bequest of an alienable and heritable estate to Jhaverba and afterwards to Divaliba. The provision as regards the plaintiff is in fact repugnant to the earlier provisions; it is clearly inconsistent with the notion of an absolute estate in his predecessors, and clearly also Jhaver could have defeated the provision in favour of the plaintiff by selling the property and so preventing there being any remaining property to go to the plaintiff. That being so, I do not think that it is possible to give effect to the will so far as the plaintiff is concerned.

In 49 I A 1 (18) it was held that where a widow takes an absolute estate a gift over of what might remain over at her death is inoperative. In 18 Eq 152 (14) a bequest to trustees for the absolute use of the testator's wife, with provision for the estate to go after her death to certain legatees after paying the debts of the wife, was held to be invalid as regards the gift over, and the wife's property went to her heirs. Similarly in 24 Ch D 616 (15) there was a legacy of £10,000 to the wife in terms which show that it was hers absolutely, and the will provided that it should go to a certain legatee after her death. It was held that the wife took absolutely and that the bequest to her was not affected by the words following, which were described as inapt. So, too, in 56 I A 372 (13), it was held that where there are clear dispositive words creating in the first instance an absolute estate of inheritance in the legatee, subsequent restrictive clauses to come into operation after he has inherited are void, being repugnant. That being the case with the present will, I think that it is inoperative so far as the plaintiff is concerned and that the plaintiff can get no rights at all under the will. On this view of the case, it is not necessary for me to discuss the subsidiary point raised, viz., the effect of the Bhagdari Act upon the validity of the will.

The other main question for consideration in this case is whether plaintiff has acquired title to the property by reason of his possession. I do not think that in fact he ever was in possession of the property. His possession, if any, seems to have been a paper possession only. The entry of his name in the Record of Rights and in the heirship register amounts to very little, because the entry does not seem to have been made after inquiry. Then too he has produced no rent notes in support of his possession. He says that they were stolen; but I have great difficulty in believing that, especially as he did not take the trouble to have his rent notes (if any) entered in the appropriate register. Then there is the statement of the private Talati Tribhuvan made at an earlier inquiry, to the effect that he never at any time paid rent recovered from the tenants to the plaintiff and that he never executed any rent notes on behalf of the plaintiff. I think too that the accounts which the plaintiff professes to have kept are irregular and do not help him, and that the oral evidence of his possession is thoroughly unsatisfactory. I need not say any more in this respect, because this question has been fully discussed in the judgment just delivered by my learned brother.

That being so, the effect of plaintiff's possession of the property as regards his title to the land scarcely survives. There were however a number of cases cited before us with the object of showing that mere possession can justify a declaration of title as against a trespasser, or even justify a Court restoring possession to a person who has lost possession. But I think that the examination of all those cases shows that they are based upon the theory that possession is prima facie evidence of title. When however, as in this case, it is shown that plaintiff's title under the will is definitely disproved and

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plaintiff bases his title upon nothing other than the will and the fact of his possession, it is clear that the mere fact of plaintiff's possession, if any, could not by itself give rise to any presumption of title in his case. I think therefore that the ordinary rule applicable to ejectment suits, except those falling under S. 9, Specific Relief Act, must be applied to this suit also, viz., that besides proving possession within 12 years the plaintiff must also prove title. In the result I hold that the plaintiff has no title to the property and that his suit was rightly dismissed. There is however one house (lot No. 193) of which plaintiff is still in possession, and has been shown to have been in possession, since the death of Divali. He has sued for a declaration of his title to that house and for an injunction restraining the defendants from interfering with his possession. I agree that in this respect there is no reason why he should not receive a declaration as against the defendants that he is at any rate entitled to remain in possession of the house until dispossessed in due course of law, and that they must be restrained from interfering with his possession. In other respects I agree that the appeal must be dismissed with costs. As regards the cross-objections I agree that in the circumstances of the case there is no reason why the defendants should not pay their own costs in the first Court, and that the cross-objections also should be dismissed with costs.

R.M./R.K. *Appeal dismissed.*

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BARLEE AND N. J. WADIA, JJ.

Secy. of State—Appellant.

v.

Vedavyas Venkatesh Bhatta and *others* —Plaintiffs—Respondents.

Letters Patent Appeal No. 13 of 1934, Decided on 20th September 1935, from decision of Divatia, J., in S. A. No. 810 of 1930.

Bombay Land Revenue Code (5 of 1879), Ss. 137 and 151—S. 137 is subject to S. 151 which restricts prerogative of crown to demands for current years.

S. 137 gives priority to the claims of the Government, which is more extensive than the common law prerogative, since it creates a right to priority over all debts of every kind whether secured or unsecured. It is, however, to be read with S. 151, which restricts the prerogative by confining the preference given or declared by S. 137 to demands for the current year: 1935 *Bom* 25; 5 *Bom H C (O C J)* 23 and 1919 *Cal* 908, *Ref.*

Per *Divatia, J.*—The right of priority given to Government under S. 137 is modified by Ss. 151 and 183. [P 217 C 1, 2]

K. McI. Kemp and *B. G. Rao*—for Appellant.

G. P. Murdeshwar and *S. V. Palekar*—for Respondents.

S. A. No. 810 *of* 1930.

Divatia, J.—This appeal has been preferred by the Government in a suit filed by the plaintiffs who were sureties of one Ganpat Prabhu. The plaintiffs' case was that certain property belonging to their principal-debtor was sold at the instance of Government for certain forest dues, that the plaintiffs had become sureties for Ganpat for another claim, which defendant 2, the Ankola Urban Co-operative Credit Bank, had against Ganpat as well as his joint brother Govind, and that the excess amount which remained after the sale was held to satisfy forest dues, was liable to be applied for the debt which the plaintiffs' principal-debtors owed to the Bank with the result that the plaintiffs' liability would be discharged to that extent but that as the excess was applied by Government to another forest claim known as the sunksal dues against the same person Ganpat, the Bank could not get anything from the excess amount with the result that the plaintiff's liability continued, and hence they asked for a declaration that the amount of the decrees obtained by the Bank against the plaintiff had been fully paid, and also for an injunction restraining the Government, defendant 1, from taking any coercive measures against the plaintiffs for the recovery of the amount due by them under the decrees as arrears of land revenue or otherwise. The facts which have led to this litigation can be shortly narrated thus:

Ganpat had taken advances from Ankola Firewood Depot, and on 21st May 1925, the Divisional Forest Officer sent a claim for Rs. 1,844 against Ganpat to the Collector in order that the said amount may be recovered as arrears of land revenue under the Land Revenue Code. On 2nd August 1926, the sale proclamation of Ganpat's property was issued, and the sale was ultimately held on 15th and 17th September 1926. But before the sale took place, in July 1926 there were award decrees passed against Ganpat and his brother as the principal-debtors and

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the plaintiffs as sureties for Rs. 2,011 and odd in favour of the Ankola Urban Co-operative Credit Bank. It is provided in S. 59, Bombay Co-operative Societies Act 7 of 1925, that those claims were to be realised according to the law and under the rules for the time being in force for the recovery of arrears of land revenue, and therefore, those decrees were sent by the Registrar of the Co-operative Societies to the Collector to be realised as arrears of land revenue. The proceedings were sent to the Mamlatdar who received them on 3rd August, before the sale actually took place. In the meanwhile on 6th September 1926, Ganpat's brother Govind applied to the Conservator of Forests that the amount of Rs. 5,971 which was jointly and severally payable by both these brothers to the Government for the Sunksal dues may be realised from the excess remaining with the Mamlatdar in the sale proceedings to be held for the realisation of the Ankola Forest dues by the sale of Ganpat's property.

The application was forwarded by the Collector to the Conservator of Forests on 15th September and it was stated therein that the excess of that sale may be kept in revenue deposit for those dues, and the Mamlatdar made a report on 1st October, that the balance of the sale which was held in the meanwhile on 15th and 17th September, consisting of Rs. 2,756 was credited as revenue deposit. Then on 4th October 1926 the Collector sent a memo to the Mamlatdar to the effect that the said revenue deposit be kept as such pending further orders and that no amount out of it should be restored to the defaulter or given to the Ankola Bank, and on the same day the Collector wrote a letter to the Conservator of Forests to the effect that a regular requisition for the Sunksal dues was not received in proper form, and that unless a demand was received in proper form and properly verified, any order to recover the Sunksal dues as arrears of land revenue from the deposit money might be irregular and perhaps illegal, and that, therefore, the requisition should be sent at once, and on 12th October the formal requisition was sent by the Forest Officer, and ultimately on 21st October the Collector wrote to the Conservator of Forests that the balance of Rs. 2,756 was credited to the Forest Department for the Sunksal dues, and as the dues of the Bank were taken as not satisfied out of the sale proceeds, a notice was issued on 12th January 1927, by the Collector to the present plaintiffs as well as to Ganpat as to why the property should not be attached for recovery of the claims of the Bank which were to be recovered as if they were arrears of land revenue. The plaintiffs have, therefore, filed the present suit for the declaration and injunction as stated above.

The defence of the Government to the suit was that the claims of the Crown were paramount and had priority over other claims, that the Sunksal dues had, therefore, a priority over the claims of the Bank, and that, therefore, the Government was entitled to appropriate the whole of the excess to the Sunksal dues, and the plaintiffs were not entitled to the reliefs asked for. The learned trial Judge, after framing the appropriate issues, came to the conclusion that the claims of the Government were paramount under S. 137, Land Revenue Code, and that the Collector had, therefore, the power to give the forest outstandings, i. e., the Sunksal dues, precedence over all other claims including those of the Bank even though the dues of the Bank were recoverable as the arrears of land revenue. He, therefore, dismissed the suit. The plaintiffs appealed against the decree, and the learned District Judge varied it by holding that the claims of the Government for the Sunksal dues had no priority over the claim of the Bank, but that both these claims were entitled to rateable distribution under S. 183, Land Revenue Code, and that, therefore, the society was entitled to Rs. 694-11-5, and to this extent the Bank, and therefore, the plaintiffs must be given credit out of the excess amount lying with the Collector. The reasoning of the learned Judge was that the Government had priority as to their claims only with respect to the demand of the current arrears of revenue, but that subject to that all claims were to be rateably distributed between all persons who had claims against the excess from the sale-proceeds, that under S. 183, Land Revenue Code, Ganpat could have asked for the return of the whole of the balance and he could have got that balance, but that as there were two other claims, that balance could not be given to him, but that that

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balance should be rateably distributed between the two rival claimants. Against this decree of the appellate Court the present appeal has been filed by the Government and the plaintiffs have also filed cross-objections.

It has been contended by the learned Assistant Government Pleader that the decree of the lower Court was not correct because it ignored the imperative provisions of S. 137, Land Revenue Code, according to which the claim of Government to any moneys recoverable under the provisions of Ch. 11 shall have precedence over any other debt, demand or claim, and he says that S. 183 which speaks of the balance of the sale-proceeds being liable to the payment of claims recoverable as arrears of land revenue, has to be read as subject to the provisions of S. 137, with the result that if there was any competition between a Government claim and a private claim even though that private claim was to be realised as if it was an arrear of land revenue, the Government in all cases is entitled to have priority, and it is only after the claim of the Government was satisfied that a private creditor was entitled to have his claim satisfied from the balance thereof, and that, therefore, the order of the trial Court was correct. On the other hand, it has been contended on behalf of the respondents-plaintiffs that S. 137 is not to be read by itself but is to be read with three other sections appearing in the same chapter, namely Ss. 150, 151 and 183; and S. 183 speaks of the payment of the arrears due by a defaulter recoverable as arrears of land revenue, and they were to be recovered under any of the six modes laid down in S. 150, Land Revenue Code, and though S. 151 expressly enacts that the said modes or processes may be applied in the recovery of arrears of former years as well as for the current year, the preferences given by Ss. 137 and 138 would apply only to demands for the current year, and that, therefore, where there was a rival claim between several persons, one of whom may be the Government as against a private creditor, and where all the claims were to be recovered as arrears of land revenue, then in that case the Government's claim to priority under S. 137 had been modified by S. 151 to this extent: that it is only for the demand for the current year that the Government would have priority, but that with respect to the rest there is no such priority and that the demands of all those persons were to be rateably distributed and divided under S. 183.

It is further contended that, really speaking, in this case the Sunksal dues had not been properly and legally notified before the sale took place and that the regular requisition was sent after the sales were held, and that, therefore, the Sunksal dues cannot be regarded as the dues for which the excess of the sale proceeds was liable, and that therefore the whole of the remaining amount should be devoted for the liquidation of the Bank's claim. It is urged in the alternative that if the excess lying in the Court is liable to be rateably distributed then it is to be distributed not simply between the Bank and the Government for the Sunksal dues but for the claims of all the three dues, namely, the Ankola forest dues, the Sunksal dues as well as the Bank's dues, because S. 183 speaks of the arrears due by a defaulter at the date of the confirmation of such sale, and that all the three claims for arrears were sent to be realized before the sale took place. Therefore, if there is to be any distribution, then the excess is to be distributed rateably for all the three claims.

Now, as between these rival contentions, I think, looking to the scheme of the Code for realisation of claims as arrears of land revenue, there is force in the contention of the respondents that in settling the claims of all those persons who are entitled to have the claims satisfied as arrears of land revenue, and therefore to seek the help of the revenue authorities under S. 150 of the Land Revenue Code, the right of priority given to the Government under S. 137 has been curtailed and limited only to the demands for the current year, and if these sections are to be read together, and if S. 151 is to have any meaning at all, it can have only this meaning that Government has no right of priority as against claims recoverable as arrears of land revenue except to the extent of the demand for the current year. When the legislature has given certain rights to persons, namely that their demands are to be realised as arrears of land revenue, then it must be regarded that they are given a substantial right under S. 183 of the Land Revenue Code which clearly says

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that the sale-proceeds were to be distributed between all those who were entitled to have their claims satisfied as arrears of land revenue. No such distinction is made in this section between Government claims on the one hand and private claims on the other. S. 151 also does not make any such distinction, and I, therefore, think that instead of regarding S. 183 as being governed by and subject to the provisions of S. 137, the proper construction of this section is that the right of priority given to Government has been modified by the two Ss. 151 and 183. I, therefore, think that there is force in the respondent's contention that the Government is not entitled to priority but that there should be a rateable distribution between these claims.

I think there is force also in the further argument that the sale-proceeds should be distributed among all the three claims and not between only Sunksal dues and the Bank's dues. S. 183 clearly speaks of the arrears due by a defaulter at the confirmation of the sale, and as I have stated above, all these three arrears were before the Collector at that time. Therefore, it would follow that all the three claims must be rateably satisfied out of the sale-proceeds. I do not accept the respondents' contentoin that the Sunksal dues cannot be satisfied at all from the sale-proceeds, because there had been no regular requisition before the sales were held. No provision in the Forest Act or any other enactment is pointed out to show that before a property can be sold as arrears of land revenue for the forest dues a regular requisition should have been sent. The Collector's letter shows that he was apprehensive that that course may be irregular, but it does not follow that because a regular requisition had not been sent, the sale could not take place as if it was for arrears of land revenue. On the other hand, it appears that before the sale was held, an application by Govind, Ganpat's brother, that the Sunksal dues should be satisfied out of the excess of the sale-proceeds, was forwarded by the Collector to the Conservator of Forests on 9th September, and therefore the Sunksal dues would certainly be those dues which are to be rateably distributed under S. 183.

The result, therefore, will be that the decree of the lower appellate Court will be set aside and in its place the following decree would be substituted, that the plaintiffs are entitled to a declaration that the proceeds of the sale for the Ankola forest dues, which took place on 15th and 17th September 1926, shall, after defraying the expenses of the sale, be applied to the payment of the Ankola forest dues, the Sunksal forest dues and the dues under the award decree obtained by the second defendant Bank, against Ganpat and others, and that the sale-proceeds shall be rateably distributed between these three creditors, with the result that the second defendant Bank would be entitled to recover Rs. 962-15-0 out of the sale-proceeds and to an injunction restraining defendant 1 from taking any coercive measures against the plaintiffs to recover any amount in excess of the amount due after credit is given to the Bank for the said sum of Rs. 962-15-0. As each party has partly succeeded, there will be no order as to costs of the appeal as well as of the cross-objections. The Secretary of State for India in Council appealed under the Letters Patent.

Letters Patent Appeal.

Barlee, J.—This is an appeal from a judgment of Divatia, J. The facts on which his decision is based are shortly these: The Divisional Forest Officer had a claim against one Ganpat under the Forest Act for Rs. 1,844 in respect of advances from the Ankola Firewood Depot, and he sent his claim to the Collector in order that the said amount might be recovered as arrears of land revenue under the Land Revenue Code. Ganpat's property was sold and thereafter two other claims were put forward, one claim in respect of money due to the Forest Department from Ganpat and his brother, known as Sunksal dues, and a claim made on behalf of the Ankola Urban Co-operative Credit Bank. Before the sale had taken place this Bank had obtained award decrees against Ganpat and his brother, and the plaintiffs, their sureties, and they claimed a share of the proceeds of the sale. The question for determination was whether the claims made by Government were to be preferred to the claims that were made by the Bank, which was a private person. Divatia, J., held that the right of priority given to Government by S. 137 of the Bombay Land Revenue Code was curtailed by S. 151 of the Bombay Land Revenue

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Code, and on reading these two sections together he decided that the Government had a right of priority only for the land revenue demand for the current year. He therefore ordered that the decree of the lower appellate Court should be set aside and that the sale-proceeds should be applied, after defraying the expenses of the sale, to the payment of Ankola Forest dues, the Sunksal Forest dues and the dues under the award decree obtained by the Bank rateably. The Government of Bombay have appealed.

The view taken by Divatia, J., has been taken by the learned Chief Justice in 36 Bom L R 1103 (1), where he held that Ss. 137 and 151 should be read together and that they confer priority only in respect of arrears for the current year and not for arrears of past years. This is the only decision of our own Court on this point which has been brought to our notice. It is not disputed that the Crown is given priority by common law. 5 B H C (O C J) 23 (2) is the leading case on the subject. There it was held, after an exhaustive survey of the authorities:

> A judgment-debt due to the Crown is in Bombay entitled to the same precedence in execution as a like judgment-debt in England, if there be no special legislative provision affecting that right in the particular case.

But this common law priority is confined to unsecured debts: cf. 45 Cal 653 (3), where it is held:

> that so far as the immoveable properties were concerned including the fixtures, the Crown was not entitled to priority, that the Alliance Bank as first mortgagee ranked first, but the Delhi and London Bank as second mortgagee was not entitled to priority over the Crown.

It follows that the priority given to the claim of Government by S. 137, Bombay Land Revenue Code, is very much more extensive than that given by the common law, since it creates on behalf of the Government a right to priority over all debts of every kind whether secured or unsecured, and the learned Advocate General contends that S. 151 which restricts the preference given by S. 137 to the demands for the current year, merely takes away this statutory priority and does not interfere with that given by common law. It is common ground that the Crown has a common law priority and that it exists until it is modified by the legislature; and it is not denied that the provincial legislature had power to modify the common law prerogative. The narrow question before us, then, is whether the legislature has not interfered with the common law prerogative. In my opinion it has done so. S. 137 does not merely create additional rights in excess of those given by the common law but embodies a declaration of the whole of the rights of the Crown to priority. It includes not only the right of priority over secured debts which is new, but also declares the right of priority over debts of all sorts. Therefore S. 151 which confines the preference given or declared by S. 137 to demands for the current year, does in terms restrict what was the common law prerogative of the Crown. The learned Advocate-General has pointed out that this may lead to awkward results, but where a section is clear—and in this case we think the section is clear—we cannot allow such considerations to influence our decision. For this reason we agree with the former decision of Divatia, J., and dismiss this appeal with costs (two sets).

N. J. Wadia, J.—It has been held in 36 Bom L R 1103 (1) that Ss. 137 and 151, Bombay Land Revenue Code, should be read together, and they confer priority only in respect of arrears for the current year and not for arrears of past years. The contention of the learned Advocate-General is that apart from S. 137, Bombay Land Revenue Code, the Crown has under its prerogative a right to precedence for its debts over the unsecured debts of private persons, and that this right which is independent of S. 137, Bombay Land Revenue Code, cannot be affected by S. 151. S. 137 admittedly goes further than the ordinary prerogative of the Crown, and gives to the claims of Government under the provisions of Chap. 11 precedence over any other debts, secured or unsecured. S. 151 provides that the preference given by S. 137 to Government claims shall apply only to demands for the current year. It, therefore, expressly takes away the precedence which S. 137 gives to Government demands for arrears other than those of the current year, and it

1. Balmukund v. Collector, Ahmednagar, 1935 Bom 25=154 I C 519=59 Bom 154=36 Bom L R 1103.
2. Secy. of State v. Bombay Landing & Shipping Co., (1868) 5 B H C (O C J) 23.
3. Bank of Upper India v. Administrator-General of Bengal, 1919 Cal 908=47 I C 529=45 Cal 653=22 C W N 793.

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takes away that precedence without any qualification, i. e., with regard to unsecured as well as secured debts. It undoubtedly has the effect of reducing the right of precedence for its debts over unsecured debts of private persons which the Crown would have under its ordinary prerogative. But we cannot, merely because it has this result, assume in the face of the express language of the section that such a result was not intended by the section. The prerogatives of the Crown can be affected with the consent of the Crown, that is by statute. I am, therefore, of opinion that the view taken by Divatia, J., is correct, and that the appeal must be dismissed with costs.

V.B./R.K. *Appeal dismissed.*

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BLACKWELL, OFFG. C. J.

Dorabji Nowrosjee Pajnigar—Plaintiff.

v.

Jamshetji Pestonji Mehta—Defendant.

O. C. J. Suit No. 245 of 1935, Decided on 27th June 1935.

Negotiable Instruments Act (1881), S. 69—Promissory note "payable at *P* or *B* or elsewhere"—Suit by promisee without presentation—Presentation is not incumbent.

The words "specified place" in S. 69 means a place so particularised that the promisee can know where he must present the promissory note for payment. A promissory note payable at Poona, Bombay or elsewhere is not payable only at Poona or Bombay, being payable elsewhere, that is, at a place not specified, and it does not make it incumbent upon promisee to present it at any specified place: 1926 *Mad* 792 and *Beeching* v. *Gower*, (1816) *Halt* (*N P*) 313 *Disting.* [P 219 C 1]

H. D. Banaji—for Plaintiff.

J. S. Khergamwalla—for Defendant.

Blackwell, Offg. C. J.—This is a suit upon a promissory note, dated 11th May 1932, to recover the sum of Rs. 5,000 and interest at the rate of one per cent. per mensem. The promissory note has been put in as exhibit A. It contains the following provisions: "money to be payable at Poona, Bombay, or elsewhere." The note was endorsed by the present plaintiff to Messrs. Juharmal Jivraj & Co., but was subsequently endorsed back by them to the plaintiff, and notice of that fact was given by Messrs. Juharmal Jivraj & Co., to the defendant. These facts appear from documents containing Ex. 1 which were put in by consent.

The only material part of the written statement is the first paragraph in which the defendant submits that the promissory note in suit not having been presented for payment, the suit is not maintainable; and the only issue raised is whether the suit is maintainable having regard to the fact that the promissory note in suit has not been presented for payment to the defendant. The question for decision in this case is whether on the wording of this promissory note, presentment for payment was required in law. It is not alleged in the plaint that any presentment for payment was in fact made. The question turns upon S. 69, Negotiable Instruments Act, which is in these terms:

> A promissory note or bill of exchange made, drawn or accepted payable at a specified place must, in order to charge the maker or drawer thereof, be presented for payment at that place.

Mr. Khergaumwalla for the defendant contends that this promissory note is a note payable at a specified place, inasmuch as it is payable at Poona and Bombay, and he submits that the words "or elsewhere" do not, as he says, deprive this note of its character of a note payable at a specified place. Mr. Khergaumwalla has referred me to 50 M L J 242 (1). In that case the promissory note mentioned "Madras or any other place where you (the creditor) have your shop as the place of payment." No presentment for payment was made either at Madras or at any other place, and it was held that the creditor had no right to sue without presentment being first made, and that the word "place" in Ss. 68 and 69, Negotiable Instruments Act, must be construed as including "places," as it would be anomalous to require presentment if one place is mentioned, but none if two places are mentioned. Consequently, it was held that if more than one place is mentioned, there must be presentment at one or the other of those places. This decision, in my opinion, does not affect the present case. Madras was one of the specified places, and the other place was specified by providing that the presentment was to be at any other place where the creditor had a shop. So that the place was defined and specified. Mr. Khergaumwalla also referred to (1816) Halt (N P) 313 (2), but that case appears to me to be of no assistance in deciding the present case.

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1. Chegganmull Sowcar v. Manicka Mudaliar, 1926 Mad 792=94 I C 384=50 M L J 242.
2. Beeching v. Gower, (1816) Halt (N P) 313.

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The question, in my opinion, turns upon what is the meaning of the words "specified place" in S. 69. In my opinion, it means a place so particularised that the promisee can know where he must present the promissory note for payment. The words of the present promissory note do not, in my opinion, fall within the section at all. It is true that the promissory note provides that it is payable at Bombay or Poona, and of course the promissory note could have been presented at Bombay or Poona; but the promissory note is not payable only at Bombay or Poona, being payable elsewhere, that is at a place not specified, and it does not make it incumbent upon the promisee to present it at any specified place. Accordingly the contention that this promissory note is a note payable at a specified place within the meaning of that section is, in my opinion, untenable. In my judgment, therefore, this defence fails, and this is the only defence which is relied upon. I answer the issue in the affirmative.

Accordingly, I pass a decree in favour of the plaintiff for Rs. 5,000 with interest at one per cent. per mensem from 11th May 1932, till judgment, costs and interest on judgment at six per cent. per annum, less Rs. 32 for which the plaintiff has given credit, in exhibit C to the plaint the particulars of his claim.

M.D./R.K. *Suit decreed.*

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BROOMFIELD, J.

Shambhuprasad Umiashankar and *another*—Plaintiffs—Appellants.

v.

Lalbhai Bikhabhai Shah and *others*—Defendants—Respondents.

Second Appeal No. 323 of 1932, Decided on 3rd October 1935, from decision of Acting District Judge, Ahmedabad, in Appeal No. 253 of 1930.

(a) Easements Act (1882), Ss. 33 and 35—Injunction—Suit for—Easement by prescription of pankh of *S* on house of *L*—*L* cutting pankh and raising his house—Substantial injury to easement of *S*—Case for nominal damages and not injunction.

One *S* enjoyed an easement in respect of his pankh over the house of *L* for more than 20 years. *L* cut the pankh and raised his house. *S* claimed injunction:

Held: although the damage caused to *S* be substantial as to give a right of suit under S. 33, the injury caused is not very serious. *S* was entitled to nominal damages, and not for injunction: 1932 *Bom* 224; 37 *Bom* 513; 38 *Bom* 1 and 1936 *Bom* 3, *Rel. on.* [P 220 C 2]

(b) Easements Act (1882), S. 42—Easement of pankh—Cutting off pankh and raising building by servient owner—Easement is not extinguished.

If the servient owner cuts off the pankh in respect of which the dominant owner enjoyed easement by prescription and raises his house, the easement in respect of pankh is not extinguished under S. 42. [P 220 C 2]

G. N. Thakor and *V. N. Chhatrapati*—for Appellants.

P. A. Dhruva—for Respondents.

Broomfield, J.—The parties in this case are the owners of adjoining houses in Ahmedabad. The defendants-respondents raised the height of their house and in so doing cut off a pankh or weather-board projecting from the side wall of the plaintiffs' house over defendants' land. It appears that this was mostly done after the suit was filed. The plaintiffs sought an injunction against the cutting of the pankh and for the restoration of what had been cut. They also alleged that the defendants had made certain encroachments on their wall and prayed for the removal of these. The trial Court found that there had been a slight encroachment on the first floor and ordered its removal, but it dismissed the suit otherwise. The parties were ordered to bear their own costs. In appeal the Assistant Judge dismissed the appeal with costs.

In this second appeal learned counsel for the appellants-plaintiffs contends that his clients were entitled to relief either by mandatory injunction or at any rate by damages in respect of the cutting of the pankh and that they should have been given their costs also in that connection. It is further contended that the Courts ought to have found that there was an encroachment on the ground floor as well as on the first floor. As to this last point both the lower Courts have found as a fact that there is no encroachment on the ground floor, and I do not consider that any substantial point of law arises.

But I think the lower Courts are clearly wrong in holding that the plaintiffs are entitled to no relief whatever in respect of the pankh. It is now settled law that a projection of this kind is an easement and not a trespass or occupation of property giving rise to any rights to

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the property covered by the projection by adverse possession. The authorities on that point are, 34 Bom L R 395 (1), 15 Bom L R 533 (2) and 15 Bom L R 876 (3), and a recent judgment of Barlee, J. in 37 Bom L R 939 (4). The right being a right by way of easement, it has to be acquired like any other easement by grant or prescription. In this case it has admittedly been acquired by prescription, and therefore under S. 15, Easements Act, the right is absolute. The plaintiffs have a right of suit on the disturbance of their easement and are entitled to relief either by way of damages or injunction: Ss. 33 and 35, Easements Act 5 of 1882. There is a proviso to S. 33 that the disturbance of the easement must have actually caused substantial damage to the plaintiff. But Expln. 1 to the section says that the doing of any act likely to injure the plaintiff by affecting the evidence of the easement is substantial damage within the meaning of the section. As the defendants have actually cut away the plaintiffs' pankh, it is a clear case of an act affecting the evidence of the easement. In spite of what appears to be the plaintiffs' manifest legal right, and in spite of the fact that the defendants proceeded to cut the pankh after the suit was filed, it has been held by the lower Courts that the plaintiffs are entitled to no relief whatever and they have even been deprived of their costs. This seems to me to be both unreasonable and contrary to the law.

The trial Judge thought that an injunction was unnecessary because pecuniary compensation would suffice. But he did not award any pecuniary compensation. The Assistant Judge thought that the plaintiffs had no grievance at all. He says in this connection:

> The column of air space below and above this (the pankh) belonged to the defendants. Now, if defendants build over it and in doing so completely protect the plaintiff's wall then he can have no grievance. The very justification for the pankh was the protection of this wall, and if that is given by the defendants' wall the plaintiff can have no grievance whatever. Whatever relief he could have got before the pankh was actually cut, he cannot have any grievance after it is cut and the defendants build their wall right through and protect plaintiff's side wall.

This may be a good argument as long as the defendants' wall is there. But the defendants may not always have a wall in that place, and in the meantime the plaintiffs' right has been forcibly put an end to and the evidence of it destroyed. The learned advocate for the respondents suggested that the easement might be taken to have been extinguished when the defendants raised their building and cut off the pankh. The Easements Act states in what circumstances an easement may be extinguished. The only section which can be pointed to as having any relevancy is S. 42 which says that an easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner. That section is very cautiously worded, and for the reason I have already given, viz., that the defendants' building may not always be there, it is impossible to say that the easement is incapable of being beneficial to the plaintiffs at any time and under any circumstances. If any authority be needed as to the plaintiffs' right to relief for the disturbance of their easement it will be found in 16 Bom 533 (5).

The question then is what relief should be awarded to them. If they were to be given relief by mandatory injunction it would only mean that the defendants would be required to make a slit in the wall of their house and to insert the plaintiffs' pankh therein. This would doubtless be extremely inconvenient to the defendants and would hardly be of any material benefit to the plaintiffs. I agree with the trial Court that damages will suffice. Although, as I have said, the damage is substantial so as to give a right of suit under S. 33, it can hardly be said that it is very serious. The measure of damages strictly speaking would be the difference between the value of the plaintiffs' house with this easement and its value without it, and I doubt very much if the difference would be at all considerable. In my opinion the damages to be awarded should be in a sense nominal. At the same time they

1. Chhaganlal v. Hemchand, 1932 Bom 224=138 I C 458=34 Bom L R 395.
2. Shrinivas v. Balvant, (1913) 37 Bom 513=20 I C 162=15 Bom L R 533.
3. Mulia Bhana v. Sundar Dana, (1913) 38 Bom 1=21 I C 352=15 Bom L R 876.
4. Dahyabhai v. Hiralal, 1936 Bom 3=160 I C 62=37 Bom L R 939.
5. Nasarbhai Ahmedbhai v. Munshi Badrudin, (1892) 16 Bom 533.

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should not be contemptuous, because the plaintiffs were perfectly entitled to bring this suit in view of the unjustifiable conduct of the defendants in cutting the pankh without leave obtained. I think further that the plaintiffs are entitled to get their costs so far as the suit related to the pankh. I allow the plaintiffs Rs. 50 by way of damages and I direct that they get half their costs throughout from the defendants who will pay their own.

M.D./R.K. *Appeal allowed.*

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BEAUMONT, C. J. AND N. J. WADIA, J.

Emperor

v.

Rachappa Yellappa.

Criminal Ref. No. 155 of 1935, Decided on 7th February 1936, made by Sess. Judge, Dharwar.

(a) Criminal P. C. (1898), S. 195 (2)—"City survey officer" is "Court."

A "City survey officer" is a Court within the meaning of that term in S. 195 (2), Criminal P. C.

(b) Criminal P. C. (1898), S. 195 (1) (c)—Relevant date is the date Court is invited to take cognizance of offence.

Under S. 195 (1) (c) the relevant date which has to be considered by the Court is the date the Court is invited to take cognisance of the complaint, and all that the Court has to see is whether the offence in respect of which it is asked to take cognisance is alleged to have been committed by a party to any proceeding in any Court and in respect of a document produced or given in evidence in such proceeding. It is immaterial that the offence has been committed by the party before the proceedings are taken, and the bar contained in S. 195 (1) (c) will apply if, at the time when the Court is called upon to take cognizance of a complaint, the accused is a party to a proceeding in a Court in which the document has been produced or used as evidence: 1916 *All* 299; 1926 *All* 30; 1918 *Cal* 792; 14 *C W N* 479; 1916 *Mad* 72 and 1925 *Lah* 266, *Foll.*; 1931 *All* 443 (*FB*) and 4 *Bom L R* 268, *Dissent.*; 1932 *Bom* 545, *Ref.* [P 222 C 1, 2]

S. B. Jathar—for Accused.

G. R. Madbhavi, A. A. Adarkar and *K. H. Kelkar*—for Complainant.

P. B. Shingne—for the Crown.

Beaumont, C. J.—This is a reference made by the Sessions Judge of Dharwar, and the question is whether a prosecution can be proceeded with without the sanction of a Court under S. 195, Criminal P. C. The material facts are that on 3rd January 1927 a mortgage of certain immoveable property was executed, which mortgage was subsequently transferred to the present complainants. On 11th February 1935, accused 1 took the mortgage deed from the father of the complainants, in whose custody it was, and it is alleged that accused 1 and accused 2, who is the second mortgagee of the property, subsequently forged an endorsement of satisfaction on the mortgage. The other accused are alleged to have either written the forged endorsement, or attested it, and so to have abetted the offence of forgery.

On 16th February 1935, accused 2 made an application to the City Survey Officer, Gadag, to substitute his name as a mortgagee of the property in place of the name of the complainants, and in support of that application he relied on the endorsement of satisfaction on the mortgage, which is alleged to have been forged. On 23rd February 1935, a complaint was lodged against the accused under Ss. 467 and 471, I. P. C. The learned Magistrate framed a charge not only under Ss. 467 and 471, but also under S. 420. He then however came to the conclusion that he could not take cognizance of the offence under S. 467 or S. 471 without a complaint of the City Survey Officer. He was apparently not willing to proceed only with the complaint under S. 420, so he refused to proceed with the matter. From his order there was a revision application to the Sessions Judge, who considered that a complaint by the City Survey Officer was not necessary, and that the prosecution could proceed, and he therefore referred the matter to us with a recommendation that we should make an order directing the Magistrate to proceed with the prosecution. The first question is whether the Mamlatdar, that is, the City Survey Officer, is a Court. Sub-section 2 of S. 195, Criminal P. C., provides that the term "Court" includes a Civil, Revenue or Criminal Court. The learned Sessions Judge held that the Mamlatdar was a Revenue Court, and I am not disposed to differ from him in that view.

The next question which arises is whether the consent of that Court is necessary to the prosecution. Now S. 195 provides that no Court shall take cognizance of offences dealt with under sub-clauses (a), (b) and (c) except upon complaints of the persons therein mentioned. Sub-clause (a) I need not refer to. Sub-clause (b) refers to offences punishable

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under various sections of the Penal Code, those sections including offences of perjury and fabrication of evidence, and provides that no Court can take cognizance of offences of that nature when such offences are alleged to have been committed in or in relation to any proceeding in any Court except on the complaint of such Court. So that under that clause the offence must have been committed in connexion with proceedings in the Court which has to lodge the complaint. Then we come to sub-clause (c), which is the material sub-clause for the present purpose, and which provides that no Court shall take cognizance of any offence described in S. 463, that is forgery, or punishable under S. 471, that is using a forged document, S. 475 or S. 476, to which no further reference need be made, of the Penal Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate. Now reading that section apart from authority, I think the relevant date which has to be considered is the date at which a Court is invited to take cognizance of the complaint. At that moment the Court has to ask itself whether it is debarred from taking cognizance by reason of the provisions of S. 195, and in cases falling under S. 463 or S. 471, Penal Code, the Court has to see whether the offence in respect of which it is asked to take cognizance is alleged to have been committed by a party to any proceeding in any Court and in respect of a document produced or given in evidence in such proceeding. Now in this case the offence had been committed by a person who, at the date of the complaint, was a party to a proceeding in a Court, and the document had been produced or given in evidence in such proceeding, and therefore the words of the section would seem to apply.

But it is suggested that the words "committed by a party to any proceeding in any Court" mean that the alleged offence must have been committed by a person who was at the date of the committal of the offence a party to proceedings in a Court, and must also have been in respect of a document produced or given in evidence in such proceeding. If that is the meaning of the section, it seems to me that it can have but little effect, because people who are minded to launch false cases, and to support their cases by forged documents, do not, as a rule, launch the case first and then forge the documents on which they propose to rely. They prepare the ground beforehand. They forge their documents first and then launch their proceedings based on those documents. So that if the section is only to apply to a person who commits forgery, whilst he is a party to a proceeding, of documents used in those proceedings, the section will very rarely have any application.

That view of the matter has appealed to most of the High Courts in India, and there is a long current of authority in which it has been held that if at the time when the Court is asked to take cognizance of a complaint the accused is a party to proceedings in a Court in which the document has been produced or used in evidence, then the bar contained in S. 195 (1) (c) applies. That view prevailed in 38 All 169 (1), 44 Cal 1002 (2), 14 C W N 479 (3), 48 All 60 (4) and 5 Lah 550 (5), and in a case in the Court of the Judicial Commissioner in Sind: 1932 Sind 90 (6). I think also that the reasoning adopted in those cases was approved by the Madras High Court in 39 Mad 677 (7), though that was actually a case under sub-clause (b). But a contrary view has recently prevailed in a Full Bench decision of the Allahabad High Court: 53 All 804 (8). The first criticism which occurs to one on that case is that the learned Judges do not notice any of the previous authorities which are opposed to the view they take. They do, however, definitely hold that

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1. Emperor v. Bhawani Das, 1916 All 299=35 I C 161=14 A L J 74=38 All 169.
2. Nalini Kanta Laha v. Anukul Chandra Laha, 1918 Cal 792=39 I C 490=18 Cr L J 522=21 C W N 640=44 Cal 1002.
3. Teni Shah v. Bolahi Shah, (1909) 14 C W N 479.
4. Kanhaiya Lal v. Bhagwan Das, 1926 All 30 =89 I C 1053=26 Cr L J 1485=48 All 60.
5. Khairati Ram v. Malawa Ram, 1925 Lah 266=85 I C 377=26 Cr L J 537=5 Lah 550.
6. Hayat Khan v. Emperor, 1932 Sind 90= 1932 Cr C 530=137 I C 341=33 Cr L J 452 =26 S L R 73.
7. Re Parameshwaran Nambudri, 1916 Mad 72 =31 I C 161=16 Cr L J 721=39 Mad 677.
8. Emperor v Kushal Pal Singh, 1931 All 443 =1931 Cr C 715=134 I C 225=32 Cr L J 1105=53 All 804 (S B).

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S. 195 (1) (c), Criminal P. C., applies only to cases where an offence mentioned therein is committed by a party as such to a proceeding in any Court in respect of a document which has been produced or given in evidence in such proceedings. The reasoning which, as I gather, appealed to the learned Judges is this. They say that you must read S. 195 (1) (c) and S. 476, Criminal P. C., together, because S. 195 imposes a bar to a complaint, and S. 476 provides the method of removing the bar by specifying how complaints to be made by a Court in cases which fall under S. 195 are to be dealt with. The judgment points out that under S. 476 the Court can only take action in relation to an offence which appears to have been committed in or in relation to a proceeding in that Court, and if S. 195 (1) (c) applies to offences bearing no relation to proceedings in Court, then there may be cases, which fall under S. 195 and in which the bar exists, but in which the method for removing the bar specified in S. 476 does not exist. The argument is that the two sections should be co-extensive, but with all respect to the learned Judges, the construction which they place upon S. 195 (1) (c) does not make the sections co-extensive. If S. 195 (1) (c) is limited to offences committed by a party as such to a proceeding in Court, then such offences can only be committed in such proceeding, whilst S. 476 covers offences committed not only in, but in relation to any proceeding in any Court. The great majority of offences which fall to be dealt with under S. 476 are committed in relation to proceedings in Court, rather than in proceedings in Court. I should think that only rarely would a case arise in which a forged document produced or given in evidence in Court had not been forged in relation to the Court proceedings. If such a case were to arise, the complaint under Section 195 (1) (c) would have to be made under the normal process for lodging complaints, and not under the special process provided in S. 476. The Allahabad Court notes that in that event there will be no appeal against a decision to lodge a complaint or a refusal to lodge a complaint such as is given by S. 476-B when the case arises under S. 476. That may be so, but in such a case, if the High Court thought that injustice had been done, it could always act in revision. In my opinion, the reasoning of the Full Bench in 53 All 804 (8), cannot be supported. In my view the provisions of S. 195 (1) (c) apply if at the time when the complaint is lodged the accused person is a party to a proceeding. Whether it would apply if the proceedings in Court had terminated, so that the accused had only previously been party to a proceeding, it is not necessary to consider.

The learned Sessions Judge noticed the conflict of authority in other High Courts, but considered himself bound by the decision of this Court in 4 Bom L R 268 (9). That case was a case under S. 471, Penal Code, that is, of using a forged document, and a question was submitted to this Court by the then Chief Presidency Magistrate in these terms:

> Whether in the event of an offence punishable under S. 471, Penal Code, being made out in a complaint, the use complained of being prior in date to the use of the document in question in evidence in a civil Court, the sanction of such Court is necessary under S. 195 (1) (c), Criminal P. C., before a criminal Court can take cognizance of such offence.

And the answer which this Court makes is:

> The Court thinks that the answer to the question put by the Chief Presidency Magistrate should be in the negative. Sanction under S. 195 (1) (c), Criminal P. C., for an offence under S. 471, Penal Code, is not necessary in respect of a use made outside the Court.

The accused in that case was being charged with having forged a cheque, and it was alleged that he had used that cheque in a sale transaction prior to and apart from the proceedings in the Bombay Small Cause Court, in which the genuineness of the cheque was challenged. There is no doubt an element of common sense in saying that the sanction required under S. 195 (1) (c) ought not to apply to a case of user of a forged document which has no relation whatever to proceedings in which the document is given in evidence. For example, supposing a mortgage is forged, and money is raised on it from a sub-mortgagee, and then subsequently the mortgagee sues the mortgagor to enforce the mortgage and it is held in those proceedings that the mortgage is forged, it certainly seems strange, if the sub-mortgagee cannot lodge a complaint for

9. Noor Mahomad v. Kaikhosru, (1902) 4 Bom L R 268.

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having been defrauded by the user of the forged mortgage without obtaining the sanction of a Court in proceedings instituted by the mortgagee to which the sub-mortgagee was no party. At the same time, it is difficult to see how the decision can be reconciled with the wide language of S. 195 (1) (c). That was the difficulty which appealed to the then Chief Presidency Magistrate, but the High Court did not deal with the point. The decision has been disapproved in other High Courts and it was doubted by Broomfield, J., in this Court in 34 Bom L R 1090 (10). The decision may at some future time have to be reconsidered, but it does not apply to the facts of this case, because it is not suggested that there was any independent user of the forged document outside the proceedings in the Court. The primary offence here is the offence of forgery, and not merely user of a forged document. I think therefore that the learned Judge was wrong in supposing that he was bound by the case of 4 Bom L R 268 (9). We propose therefore to make no order on the reference. The Magistrate can proceed with the existing complaint under S. 420 unless the complainants want to move the Court to make a complaint under S. 195 (1) (c).

N. J. Wadia, J.—I agree. The learned Sessions Judge has made this reference to us, because of the conflict of authority with regard to the interpretation of S. 195 (1) (c), Criminal P. C. In 38 All 169 (1) a Division Bench of the Allahabad High Court held that the words "when such offence has been committed by a party to any proceeding in any court" used in S. 195 (1) (c) refer not to the date of the commission of the alleged offence, but to the date on which the cognizance of the criminal Court is invited, and that when once a document has been produced or given in evidence before a Court, the sanction of that Court, or of some other Court to which that Court is subordinate, is necessary before a party to the proceedings in which the document was produced or given in evidence can be prosecuted, notwithstanding that the offence alleged was committed before the document came into Court, at a date when the person complained against was not a party to any proceeding in Court. The view which the Allahabad High Court took in that case has been followed by that Court in a subsequent decision, 48 All 60 (4), by the Calcutta High Court in 44 Cal 1002 (2), by the Madras High Court in 39 Mad 677 (7), and by the Lahore High Court in 5 Lah 550 (5), and on the plain language of the section itself that view would appear to be correct.

If it had been the intention of the legislature to restrict the necessity of obtaining sanction to cases of offences under Ss. 463 and 471, I. P. C., committed by a party to any proceeding in any Court as such party in respect of a document produced or given in evidence in such proceeding, that is, committed after the proceedings in Court had started, it would have been easy to make that meaning clear. The words of the section as they stand seem to me to imply no such restriction. The difficulty has been created by the view taken by this Court in the case of 4 Bom L R 268 (9), and by the Allahabad High Court in 53 All 804 (8). The decision in the latter case makes no reference to the previous decisions of the Allahabad High Court, or to the long series of decisions of other Courts, and the main ground on which that decision is based is that Ss. 195 and 476 of the Code must be read together, and that, therefore, S. 195 cannot be held, to apply to any cases to which S. 476 would not apply, and as in S. 476, the reference is to any offence committed in or in relation to a proceeding in that Court, S. 195 (1) (c) cannot be held to apply to offences committed prior to the institution of the proceedings. The view which was taken in 53 All 804 (8) would, however, have the effect of making the application of S. 195 (1) (c) narrower even than the application of S. 476, since it would rule out the application of the section to offences committed by a party to a proceeding in relation to such proceeding, but before the proceedings had started.

The decision of the Bombay High Court in 4 Bom L R 268 (9) refers only to S. 471, that is, the use of a forged document. No reasons are given for the decision, and the view taken in that case has been dissented from by the Allahabad High Court in 48 All 60 (4), and by the Calcutta High Court in 44 Cal 1002 (2), and the correctness of the decision has

10. Emperor v. Sanjiv Ratnappa, 1932 Bom 545 =1932 Cr C 777 = 142 I C 386 = 34 Cr L J 357=34 Bom L R 1090=56 Bom 488.

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been recently doubted by this Court in 34 Bom L R 1090 (10). The view which has been taken in 4 Bom L R 268 (9) and 53 All 804 (8) can only be taken by reading into S. 195 (1) (c) words which do not occur in it. In my opinion, it is difficult to put this interpretation upon the language of S. 195 (1) (c) as it stands. I would, therefore, hold that the view taken by the Allahabad High Court in 38 All 169 (1) is correct, and that the sanction of the Court would be necessary before a party to the proceedings in which the document was produced can be prosecuted, notwithstanding that the offence alleged was committed before the document came into Court, at a time when the person complained against was not a party to any proceeding in Court. I agree, therefore, that no order should be passed on the reference.

V.B./R.K. *Order accordingly.*

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BEAUMONT, C. J. AND BLACKWELL, J.

Commissioner of Income-tax, Bombay —Petitioner.

v.

Abubaker Abdul Rehman—Assessee—Opposite Party.

Civil Ref. No. 5 of 1935, Decided on 16th October 1935, from Commissioner of Income-tax, Bombay Presidency and Aden.

(a) Income-tax Act (1922), S. 2 (11)—Tax payable in current year is taxed on income in previous year.

The tax payable in the current year is not charged on income of that year, but on the income of the previous year, that is to say, the tax under the Indian Act is actually levied on the income of the previous year, and not, as in England, levied on the income of the current year, though that income may be, and often is, estimated by reference to the income of the previous year, since in England the return has to be made before the current year had expired: 1927 *Cal* 553 and 1934 *P C* 34, *Foll.*

[P 226 C 1]

*** (b) Income-tax Act (1922), Ss. 2 (11), 14 (2) (b), 16, and 34 — Different accounting period of businesses of assessee and of firms in which assessee interested as member—Assessee to put his income as earned in "previous year" according to year fixed by him for his business.**

If an assessee has two businesses with different accounting periods for those two businesses he cannot fix two different dates which will give him two separate previous years for the purpose of Income-tax Act. But all the same there is no reason why an assessee should not fix one date for himself, whilst a firm of which he is a member with others fixes another date. So if the assessee has fixed for himself as the previous year according to the Hindu Calendar (9th November 1931), whilst the firm in which the assessee is a member has fixed the previous year the year ending on 31st December 1931, the assessee cannot in his return for the previous year ending 9th November 1931 include income which is proportionate to his share in the profits of the firm at the time of the assessment of those profits since that share can only be ascertained after the accounting period on 31st December 1931 and the assessee in respect of previous year which applies to him cannot be required to include his share of profits in the firm, nor can such profits be treated as having escaped assessment under S. 34.

[P 226 C 2; P 227 C 1]

K. McI. Kemp and *G. Louis Walker*—for Petitioner.

F. J. Coltman and *Jamshed Kanga*—for Opposite Party.

Beaumont, C. J.—This is a reference under S. 66 (2), Income-tax Act, 1922, in which the Commissioner raises this question:

In view of the provisions of S. 16 read with S. 14 (2) (b) of the Act, has the Income-tax Officer correctly included in the computation under S. 16 of the Act, of the total income of the assessee for the purposes of his 1932-33 assessment, his share of Rs. 1,14,812 in the income of the Imperial Movietone Co. for the calendar year 1931.

The reason for raising that question requires some explanation.

The assessee is a gentleman named Abubaker Abdul Rehman, and the year of assessment is the year 1932-33, that is the year ending 31st March 1933. The assessee is a partner in two different firms, one Abubaker Abdul Rahman & Co., and the other the Imperial Movietone Co. He also has certain property which produces income, apart from his interest in the firms. The accounts of the assessee and of the firm of Abubaker Abdul Rehman & Co. are made up to Diwali, that is, in the case of the previous year in respect of the year of the assessment, 9th November 1931. But the Imperial Movietone Co. makes up its accounts to 31st December. That firm was only started on 1st January 1931, so that, it is the first accounting period which ends on 31st December 1931. In the return of the assessee for income-tax purposes, he included his property received from outside sources, and deducted a loss in respect of the firm of Abubaker Abdul Rehman & Co., and he was assessed on 3rd February

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1933, on an income of Rs. 26,262, nothing being included in that income in respect of any profits of the Imperial Movietone Co. The accounts of that Company were made up to 31st December 1931, and the share of the assessee in the profits of that firm was assessed at Rs. 1,14,812. The Income-tax Officer contended that that sum had escaped assessment within S. 34. Income tax had been paid direct by the Imperial Movietone Co. and therefore no income-tax was payable by the assessee on his share of the profits, having regard to S. 14 (2) (b) of the Act. But the Income-tax Officer was of opinion that the income had escaped assessment, and was liable for super-tax under S. 55 of the Act, and his decision was upheld on appeal by the Assistant Commissioner. The assessee, on the other hand, contends that the income which he received as a member of the Imperial Movietone Co. was received by him after the year for which he was assessed, and that those profits will have to be brought into the next year of assessment, and have not escaped assessment.

The question involves a consideration of certain sections of the Income-tax Act. In the first place, it is necessary to notice that according to the decision of the Calcutta High Court in 54 Cal 630 (1), the tax payable in the current year is not charged on the income of that year, but on the income of the previous year, that is to say, the tax under the Indian Act is actually levied on the income of the previous year, and not. as in England, levied on the income of the current year, though that income may be, and often is, estimated by reference to the income of the previous year, since in England the return has to be made before the current year has expired. That decision of the Calcutta High Court was apparently approved by the Privy Council in 61 I A 1 (2), though whether the full implications of the doctrine are realized by the Income-tax authorities in India may be doubted. If that is the basis on which income-tax is levied, it is obviously of great importance to ascertain what the "previous year" is; and "previous year" is defined by S. 2 (11), Income tax Act, in these terms:

"Previous year" means—

(a) the 12 months ending on 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said 12 months in respect of a year ending on any date other than the said 31st day of March, then at the option of the assessee the year ending on the day to which his accounts have so been made up.

Then there is a proviso that the assessee is not to be entitled to change the meaning of the expression "previous year" when once fixed by him, without the consent of the Income-tax Officer. There is, I think, nothing in that definition to suggest that an assessee can fix more than one date which determines the previous year. If an assessee has two businesses with different accounting periods for those two businesses, he cannot, I think, fix two different dates, which will give him two separate previous years for the purpose of the Income tax Act. But, on the other hand, I can see no reason why an assessee should not fix one date for himself, whilst a firm of which he is a member with others fixes another date. "Assessee" is defined in sub-s. (2), S. 2 as meaning a person by whom income-tax is payable; and under S. 3 income-tax is charged not only on every individual but on every Hindu undivided family, company, firm, and other association of individuals. So that, in my opinion, a firm is clearly an assessable unit and therefore an assessee under the Income-tax Act. The position which arises in this case is that the assessee has fixed for himself as the "previous year" the year ending 9th November 1931, whilst the Imperial Movietone Company, in which the assessee is a member, has fixed as the "previous year" the year ending 31st December 1931.

The next section to look at is S. 22 (2) which provides that in the case of any person other than a company, falling within the provisions of that section, a return has to be made setting forth the total income during the previous year. That section applies both to the assessee and to the Imperial Movietone Company, which is also an assessee. For the purpose of making a return as to his total income, the assessee has to comply with S. 16, the effect of which, read with sub-s. (2), S. 14, is that he has to include in his total income such an amount of

1. Behari Lal Mullick, In re, 1927 Cal 553=103 I C 609=54 Cal 630=31 C W N 557.
2. Commissioner of Income-tax v. Tehri-Garhwal State, 1934 P C 34=147 I C 434=61 I A 1=56 All 1 (P C).

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the profits or gains of any firm which have been assessed to income-tax as is proportionate to his share in the firm at the time of such assessment. What S. 14 (2) provides is that income-tax is not payable by an assessee in respect of his share in the profit of a firm, which has been already assessed, because naturally that share cannot be taxed twice over. If the firm is assessed, and pays the tax, then the individual members of that firm are not separately assessable in respect of their shares in the profits. But when it comes to a return of the total income of the partners for the purpose of super-tax, then, they have to include in their total income their respective shares in the profits of the firm, which have been separately assessed.

Now the position of the assessee in this case is that he has to make a return of his total income down to 9th November 1931. It is quite clear that he cannot in that return include income, which is proportionate to his share in the profits of the Imperial Movietone Company at the time of the assessment of those profits, since that share can only be ascertained after the accounting period ending on 31st December 1931. Therefore it seems to me clear that the assessee in respect of the previous year, which applies to him, cannot be required to include his share of profits in the Imperial Movietone Company. That is not really questioned by the Income-tax authorities. But they contend that as soon as the share of the profits of the assessee in the Imperial Movietone Company was ascertained, then that share was liable to tax, and must be treated as having escaped assessment under S 34. I cannot agree with that view of the matter. It seems to me that that would really involve that the assessee was accountable in respect of two previous years, one ending 9th November and the other ending,—so far as his position as a member of the Imperial Movietone Company was concerned, — 31st December and that I think is wrong. I think the assessee is only liable to tax in respect of the previous year which ends on 9th November 1931, and that any profits to which he was entitled from the Imperial Movietone Company at the date of the assessment of that company must necessarily fall within the next year of assessment of the assessee — the year, that is, from 10th November 1931 to 9th November 1932. S. 55, which imposes super-tax, which is the tax which the Commissioner seeks to levy in this case, does not, I think, carry the question any further, because all that that section provides is that

in addition to the income-tax charged for any year, there shall be charged,—levied and paid for that year in respect of the total income of the previous year, an additional duty of income tax (in this Act referred to as super-tax).

The language of that section, so far as is material, is identical with the language of S. 3, and appears therefore according to the decision of the Calcutta High Court in 54 Cal 630 (1), to make the income chargeable to super-tax as well as to income-tax, the income of the previous year. As I have already said, in the income of the previous year, the assessee is not bound to include something to which he became entitled after the termination of that year. For those reasons, I think that the question propounded by the learned Commissioner must be answered in the negative. Costs to be paid to the assessee, to be taxed on the Original Side scale.

Blackwell, J.—I agree, and have nothing to add.

V.B./R.K. *Reference answered.*

A. I. R. 1936 Bombay 227

BROOMFIELD AND MACKLIN, JJ.

Sattappa Gurusattappa Hukeri — Plaintiff—Appellant.

v.

Mahomedsaheb Appalal Kazi—Defendant—Respondent.

Letters Patent Appeal No. 18 of 1933, Decided on 15th August 1935, from decision of Tyabji, J., in S. A. No. 717 of 1931.

(a) Civil P. C. (1908), S. 71—S. 71 does not alter essential nature of powers exercised by judicial officer.

Per *Tyabji, J.*—S. 71 does not alter the essential nature of the powers exercised by the Collector. What S. 71 does is to throw the same protection on the Collector and his subordinates as that which guards judicial officers: *Tozer* v. *Child*, (1857) 7 *E & B* 377, *Ref.* [P 230 C 1]

(b) Civil P. C. (1908), Ss. 68 to 72 and Sch 3—Jurisdiction of Collectors and Courts —Distinction between explained.

Neither O. 21, nor any other part of the Civil P. C., is declared inapplicable: what is enacted is that Sch. 3 shall apply; and that

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powers conferred upon the Collector are not exercisable by the Courts: other powers continue to be exercisable by the Courts; the jurisdiction of the Court is taken away precisely to the extent to which it is conferred on the Collector: 31 *Bom* 207, *Foll.*; 11 *All* 94 (*F B*), *Ref.* [P 229 C 2]

(c) Civil P. C. (1908), S. 71 and Sch. 3—Authority to see that Collector does not exceed his powers continues in Court.

The authority to see that the Collector does not exceed his powers continues in the Court, though R. 17 made by the Local Government precludes appeals to the civil Courts against orders passed in the exercise of jurisdiction derived from Sch. 3 or the rules made under S. 70: 7 *Bom* 332; 11 *Bom* 478; 11 *Cal* 61 (*P C*); 7 *All* 407; 15 *Bom* 694; 15 *Bom* 322; *Produce Brokers Co., Ltd.* v. *Olympia Oil and Cake Co. Ltd.*, (1916) 1 *A C* 314 and *Hirji Mulji* v. *Cheong Yue Steamship Co.*, (1926) *A C* 497, *Ref.* [P 230 C 2]

(d) Civil P. C. (1908), S. 47, O. 21, Rr. 58, 59, 60 and 63 and Sch. 3—Powers under S. 47, O. 21, Rr. 58, 59, 60 and 63 are not conferred on Collector.

Powers under S. 47, O. 21, Rr. 58, 59, 60 and 63 are not conferred on the Collector; and these rules are inapplicable to questions arising between the parties themselves: 30 *Mad* 215; 19 *Bom* 328 and 28 *Bom* 458, *Ref.* [P 231 C 1]

(e) Civil P. C. (1908), Ss. 70 and 76, Sch. 3—Power of determining whether land is liable to attachment is retained by civil Court.

The question whether a particular land can be attached in execution, or whether judgment-debtor has saleable interest in the same or not cannot be determined by the Collector, and civil Court retains jurisdiction on the same. [P 233 C 1]

(f) Words and Phrases—"Qazi", meaning and duties of Qazi—Qazi's office in India can be hereditary.

The word qazi is etymologically derived from the root word for decreeing, ordaining or judging, and qazi signifies one who gives decisions. It is the technical designation for a Judge (civil as well as criminal) in the texts. In addition however to his strictly judicial functions the qazi used (by amenity) to perform other functions such as officiating at marriages, superintending, talaq (occasionally keeping marriage records) and perhaps leading ceremonial prayers. These latter are the only functions now discharged by qazis in British India. Though Islam does not as a rule recognise an ordained priesthood or clergy, or require their ministration of the efficacy of any religious ceremony, and though the services of the qazi cannot of course be forced on anyone, yet by most persons the presence of some religious officiant is considered desirable (or in a vague sense obligatory), and there is hardly any normal marriage at which the qazi or a religious dignitary is not present. It is thus obvious that the qazi's office entails in India the rendering of services to the community. This fact must not induce a closing of the eyes to the fact that when the ancient texts speak of a qazi they refer to a judicial office having entirely different functions from those of the religious officiant now spoken of as a qazi; and the applicability of the original text as to the question whether the office now known in India as that of a qazi should be hereditary may not be incontrovertible: 3 *Bom* 232; 1914 *Mad* 714; 1915 *Mad* 561; 1919 *Mad* 598 (*F B*); 1 *Bom H C R Appx* 18; 1 *Bom* 633 and 3 *Bom* 72, *Ref.* [P 233 C 2; P 234 C 1]

(g) Civil P. C. (1908), Sch. 3, Ss. 68 to 72—Power of Collector executing decree—Collector cannot go behind decree.

The Collector executing a decree transferred to him for execution is in no better position that a Court executing a decree transferred to it. He cannot go behind the decree. [P 240 C 2]

(h) Civil P. C. (1908), Ss. 68 to 72, Sch. 3—Court can consider validity of order transferred to Collector for being carried out.

The mere fact that the carrying out of the Court's order has been delegated to the Collector cannot deprive the Court of jurisdiction to consider the validity of the order: 20 *All* 428, *Foll.* [P 241 C 1]

(i) Letters Patent (Bombay), Cl. 15—Point not raised in second appeal cannot be raised in Letters Patent appeal.

In an appeal under the Letters Patent the appellant is not entitled to be heard on points which had not been raised before the Judge from whose judgment the appeal has been preferred: 1934 *Bom* 466; 1930 *Lah* 632 and 1931 *All* 490 (*F B*), *Foll.*; 1934 *All* 719, *Disting.* [P 241 C 1]

(j) Bombay Titles to Rent-free Estates Act (11 of 1852)—Neither land nor interest of de facto kazi can be sold in execution of decree.

The land which is permanently continued as service emolument appertaining to the office of kazi cannot be sold in execution of a decree against a de facto kazi who is performing services as such. The land is the watan official emolument; it is to be permanently continued and watan, which in the context can only mean land, cannot be transferred. [P 242 C 1]

P. V. Kane and *S. G. Chitale*—for Appellant.

A. G. Desai—for Respondent.

S. A. No. 717 *of* 1931.

Tyabji, J.—This case has been argued with great ability. In execution of a money decree against the appellant certain lands in his possession are attached. He contends that they are held under a sanad from the British Government, as emoluments for service consisting of the performance of the duties of a qazi; that he has no personal rights in the ownership of the lands; that accordingly they cannot be sold in execution of the decree against him. Execution was transferred to the Collector under S. 68, Civil P. C. The appellant has unsuccessfully applied to the Collector and the lower Courts to raise the attachment, and now seeks the same relief in appeal to this Court. It is argued, first, that this Court's jurisdic-

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tion is ousted by the Civil P. C., S. 70 (1), Cl. (c), read with the Land Revenue Code, S. 203, Cl. (c), authorises the Local Government to make rules consistent with Sch. 3 to the Code, providing for:

1. Orders made by the Collector or any gazetted subordinate of the Collector, or

2. Orders made on appeal with respect to such orders being subject to appeal to, and revision by, superior revenue authorities as nearly as may be as—(1) the orders made by the Court, or (2) orders made on appeal with respect to such orders,—would be subject to appeal to, and revision by appellate or revisional Courts under the Code or other law for the time being in force, if the decree had not been transferred to the Collector. The clause empowers the Government to make such rules. It does not of itself and directly enact anything. R. 17 of the Local Government now provides for appeals in regard to orders passed either under Sch. 3, Civil P. C., or in the exercise of powers conferred on the Collector by rules of the Local Government and that subject to that provision no other appeal shall lie. It is unnecessary, therefore, to consider whether in the absence of such a rule the Land Revenue Code, S. 203, read with S. 3 (1) of the same Code, would govern such orders of the Collector in regard to their appealability. The real question is whether the powers under which the civil Courts would act in the determination of the question before me, have been taken away from the civil Court; or, (in view of the wording of R. 17), the question may be formulated thus,—has the Collector determined the questions that arise, having power to determine them under Sch. 3, Civil P. C., or under the rules of the Local Government?

Section 70 is in a group of Ss. (68-72) dealing with "the delegation to the Collector of power to execute decrees against immoveable property." Complexity, against which Mahmood, J. feelingly animadverted in 11 All 94 (1), is caused by the law applicable to the exercise of any particular power delegated to the Collector, having to be sought in four quarters: (1) Ss. 68-72 of the Code; (2) Sch. 3; (3) rules made by the Local Government under S. 70; (4) the residue, (if any) of O. 21. I do not add the decisions as a fifth source of complexity: they elucidate the other four. Neither O. 21 nor any other part of the Civil Procedure Code is, it must be observed, declared inapplicable: what is enacted is that Sch. 3 shall apply; and that powers conferred upon the Collector are not exercisable by the Courts: other powers continue to be exercisable by the Courts; the jurisdiction of the Court is taken away precisely to the extent to which it is conferred on the Collector: 31 Bom 207 (2). Has the power (which the Court or Collector is invited to exercise) been conferred upon the revenue authorities or does it continue exercisable by the Courts: S. 70 (2)?

The nature of the delegation intended by the Legislature has caused differences of views: Is the Collector like a Court to which the decree is sent for execution: Ss. 38-46? or a designated person on whom the legislature has conferred specific powers, not in his capacity as Collector but as if he had been named, so that his action is not subject to interference though he happens to fill the office of Collector and the acts of that officer as such may be subject to appeal or revision by superior revenue officers, yet must these acts be deemed to be by him not as Collector but as a designated person? or does he step into the shoes of the officer otherwise entrusted with the execution of the process under O. 21, R. 25. (viz., generally the nazir of the Court)?

West, J. in two notable judgments, 7 Bom 332 (3) and 11 Bom 478 (4), decides with reference to the then law that the Collector acts ministerially and not judicially; he must refer questions that arise for decision to the Court seized of the cause; as a ministerial officer carrying out the command of a Court, he acts subject to the orders of the Court, and his discretional powers (if any) must be exercised in general subjection to the judicial directions of the Court on whose authority the coercive power exercised by him rests; except in so far as authority or discretion is expressly conferred

1. Keshabdeo v. Radhe Prasad, (1889) 11 All 94=1889 A W N 10 (F B).

2. Pita v. Chunilal, (1907) 31 Bom 207=9 Bom L R 15.

3. Mahadaji Karandikar v. Hari D. Chikne, (1883) 7 Bom 332.

4. Lallu Trikam v. Bhavla Mithia, (1887) 11 Bom 478.

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on him, he is limited strictly to the precise line of activity laid down for him in the Code and the orders under it. "In taking on himself the responsibility of departing from the decree sent to him for execution," West, J., said,

a Collector acting by his own acknowledgment, ministerially, when he delegates his function to an assistant or a mamlatdar, incurs a risk of having to answer in damages to the person who is by any error or mistake deprived of the fruits of his judgments,

—though no malice or negligence is proved. 8 C P 489 (5) is cited as authority.

After these decisions the Legislature protected the Collector by enacting the prototype of the present S. 71. The significance of S. 71 thus becomes clear. It was the subject of some discussion before me. The section does not alter the essential nature of the powers exercised by the Collector. What S. 71 does is to throw the same protection on the Collector and his subordinates as that which guards judicial officers: 7 E & B 377 (6). If, and in so far as the functions discharged by the Collector in the exercise of powers conferred on him are the same as those of the nazir under O. 21, R. 25, the acts remain the same, whether done by the nazir or a high officer like the Collector: see per West, J. Though in 8 Bom 301 (7) Sargent, C. J. in view of (1882) P J 64 (8) the Court's power to control the proceedings of the Collector to whom the decree had been referred for execution as being unsettled, yet later West, J.'s opinion was followed by Sargent, C. J.: see 11 Bom 478 (4), per Birdwood, J.: 15 Bom 322 (9) and 15 Bom 694 (10).

In any case the Collector's powers are, it is clear, confined within specified limits. Where any authority has specified powers conferred on it, it may have to be determined by the Court whether jurisdiction not vested in it by law has been assumed in any particular instance, or whether merely a wrong decision has been arrived at in the exercise of the jurisdiction vested in it. "A Court will decide for itself whether an inferior Court has clothed itself with jurisdiction by an erroneous finding or something vital to the jurisdiction." (1916) 1 A C 314 (11); 1926 A C 497 (12) Thus in 15 Bom 694 (10) Sargent, C. J., following 15 Bom 322 (9) directed the Subordinate Judge to proceed on the footing that the Collector's orders were a nullity. Quite different principles are applicable where a Court having jurisdiction has made an order, and the questions arise whether the matter is subject to appeal, and whether the appellate Court will interfere in appeal: see 11 I A 237 (13), and 7 All 407 (14), per Mahmood, J.

Since authority which is not delegated to the Collector is retained in the Court, the fact that the exercise of such authority as is in fact delegated is not subject to appeal, does not lead to the conclusion that the Collector may exercise authority beyond that delegated to him and thus oust the jurisdiction that continues in the Court. The cases I have just cited illustrate the principle. The reasoning of West, J, in 7 Bom 332 (3) and 11 Bom 478 (4), is not affected by the protection thrown on the Collector by S. 71, or by there being no appeal over his decision. The authority to see that the Collector does not exceed his powers continues in the Court, though R. 17 made by the Local Government precludes appeals to the civil Courts against orders passed in the exercise of jurisdiction derived from Sch. 3 or the rules made under S. 70.

The exact power sought to be brought into operation in any particular case supplies the clue. It has to be determined whether that power is not exercisable by the Court by reason of its having been conferred upon the revenue authorities: S. 70 (2); 31 Bom 207 (2). The power that is now in question is of determining the tenure on which the lands are held. On that depends whe-

5. Pickering v. James, (1873) 8 C P 489=42 L J C P 217=29 L T 210=21 W R 786.
6. Tozer v. Child, (1857) 7 E & B 377=26 L J Q B 151=3 Jur (N S) 774=5 W R 287.
7. Hargovan Parbhudas v. Hira Haribhai, (1884) 8 Bom 301.
8. Ramkrishna Malhar v. Ganu, (1882) P J 64.
9. Ganpatram Motiram v. Issac Adamji, (1890) 15 Bom 322.
10. Bai Amthi v. Madhav Manor, (1891) 15 Bom 694.
11. Produce Brokers Co., Ltd. v. Olympia Oil and Cake Co, Ltd., (1916) 1 A C 314=85 L J K B 160=114 L T 94=60 S J 74=32 T L R 115.
12. Hirji Mulji v. Cheong Yue Steamship Co., (1926) A C 497=95 L J P C 121=134 L T 737=42 T L R 359.
13. Rajah Amir Hassan Khan v. Sheo Baksh Singh, (1884) 11 Cal 6=11 I A 237 (P C).
14. Sundar Das v. Mansa Ram, (1884) 7 All 407 =1885 A W N 87.

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ther the judgment debtor has a saleable interest in them, and whether consequently the attachment against them should be raised. The tenure in its turn rests upon the construction of the sanad, of several Acts, of the rules under which the sanad was granted, and upon the effect of decisions.

It is argued for the respondent that the power to determine these questions has been transferred to the revenue authorities, and that it is so transferred as to leave no authority in the Court to revise or reconcile the Collector's decision to the law. This power is attributed to the Collector in one of two alternative ways :

First, O. 21. Rr. 58, 59, 60 and 63 are relied upon. But powers under these rules are not conferred on the Collector. Moreover these rules are inapplicable to questions arising between the parties themselves : R 58 runs "as if he was a party to the suit;" contrast S. 47, which refers to "questions arising between the parties to the suit." See among other cases 30 Mad 215 (15), 19 Bom 328 (16) and 28 Bom 458 (17), a characteristic judgment by, Jenkins, C. J. S. 47 (2), however, reduces to a minimum the distinction between applications under S. 47 and a suit. The significance of that distinction is this. A person who is not a party to the suit is allowed to intervene to this extent : that he may assert his claim to attached property during execution. His claim may be summarily established. But if he cannot summarily succeed he must institute a suit to which all proper persons would be parties. Whereas if the claim is between the parties themselves there is no need for a separate suit ; all the parties are already before the Court and an appeal lies. This distinction, reasonable in its inception, having led to refinement and hardship, S. 47 (2) was enacted. But these considerations are irrelevant to the present case except to the extent that they help—if they do help—in determining the exact source from which jurisdiction over the issue before me is derived. Has the Collector been invested with jurisdiction over that issue ? The first alleged source—Rr. 58 et seq—is of no avail as I have just explained.

The respondent's second alternative for attributing these powers to the Collector is, that there is no provision in O. 21 for such an application as has been made in this case ; and that by reason of O. 21, R. 92 (1) (powers under which are conferred upon the Collector) the Collector's order confirming the sale has become absolute ; and no further proceedings in execution are open to the parties. The appellant objected that the respondent ought not to be allowed to take this point at the stage at which it was taken. The respondent took the objection certainly at a very late stage. It was taken only before me, and only when Mr. Kane was finally replying on the new authorities cited by Mr. Desai in his reply. I shall assume that this objection is not taken too late, that it does not depend upon any question of fact, and that I ought to allow it to be raised now, because, it seems to me, that the objection can be answered by referring to the provisions of the Code applicable to the case, and the powers conferred upon the Collector.

These arguments derived from the rules in O. 21 are, it seems to me, based on a misconception of the scheme of the law. What has to be determined, is, I repeat, what powers have been conferred on the Collector? Is this one of the powers conferred? If (as argued for the respondent) O. 21 contains no provision for the determination of such a question, as is now before me, that is the very thing that the appellant contends. He says that the question evidently must be dealt with ; that it is of prime importance whether this property is saleable or not ; and that it is not such a question as can come under O. 21, but that S. 47 covers it. Reverting to Ss. 68 to 72, the Collector's procedure is governed first, by Sch. 3 to the Code : S. 69; secondly, by rules of the Local Government.

Under Sch. 3 his powers are entirely different from those of the nazir, the officer ordinarily entrusted with the execution of the process under O. 21. Rr. 24 and 25. The Collector is empowered to let, mortgage or sell (§ 1), to inquire with or without reference to the Court into all the liabilities of the judgment-

15. Marivittil Mathu Amma v Pathram Kunnot Cherukot, (1907) 30 Mad 215=17 M L J 377.
16. Trimbak Ramrao Deshpande v. Govinda, (1896) 19 Bom 328.
17. Dayaram v. Goverdhandas, (1904) 28 Bom 458=6 Bom 462.

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debtor and of his immoveable property (§ 5), and then sell, let or mortgage the whole or any part of the judgment-debtor's immoveable property; to manage the property with the powers of its owner; to institute suits (§§ 2-8). He is required to render accounts to the Court which made the original order for sale, and to hold the balance at the disposal of the Court; the balance is to be rateably distributed subject to certain maintenance charges (§ 9). He may sell in accordance with § 10. So long as he can exercise the powers and duties mentioned in §§ 1-10, there are restrictions against alienation by judgment-debtors and prosecution of remedies by decree-holders.

These are the Collector's powers under Sch. 3. They obviously do not cover the questions before me. The absence of an appeal from the Collector's decision (under R. 17 of the Local Government) in regard to matters falling within his powers, has no bearing on the present case since the Collector is not concerned with the question before me. Under § 4 and § 5 the Collector must inform himself of two matters: (1) the extent of decrees and claims; (2) the judgment-debtor's immoveable property. The fact that disputes may arise with reference to the first is contemplated and provided for: the Collector shall refer them to the Court [§. 4 (3)]. There is no explicit provision, however, for the second. But what is sufficient is that no power is conferred on him to decide such disputes. See R. 16. Next after Sch. 3 come the rules made by the Local Government under S. 70. The relevant rules are Rr. 15, 16 and 17. The powers conferred upon the Collector are specified in R. 15. They comprise powers under O. 21, Rr. 72 (1), 83, 86 and 92 (1), Civil P. C., viz., to permit the decree-holder to bid for and purchase the property (subject to certain conditions); postpone the sale in default of payment of the price by the purchaser; forfeit the deposit and order a re-sale; confirm the sale in default of application to set aside the sale.

A plausible argument was deduced from the power to confirm the sale: O. 21, R. 92 (1). But Government R. 16 makes it clear that the Collector has no power to determine questions such as are before me. These questions may involve a consideration of law or the taking of evidence. Consequently the Collector is required to refer them to the Court. Nor are the powers of the Court under S. 47 of the Code in any way conferred upon the Collector or otherwise detrimentally affected. The Allahabad High Court in 5 All 314 (18) has taken a much wider view of the Collector's powers than this Court. West, J., said that 5 All 314 (18) "was not so obviously correct that we ought to abandon our own view for it." Yet it has been held both in Allahabad and Bombay that it is not for the Collector to determine title, e. g., whether the debtor has no saleable interest 9 All 43 (19), 11 All 94 (1); or to set aside a sale: 25 All 167 (20); 15 Bom 322 (9); 23 Bom 531 (21); 31 Bom 207 (2); 1920 Bom 130 (22); 45 Bom 1132 (23). In 31 Bom 207 (2) it was expressly held that the Code confers no power on the Collector to set aside a sale under S. 310-A (now O. 21, R. 89); that the judgment-debtor is not deprived of the benefit of that provision where execution is transferred to the Collector; that that power must be exercised by the Court not the Collector; and that there is nothing that precludes the Court from setting aside the sale merely because it has been confirmed. 7 Bom L R 682 (24) is greatly relied upon by the respondent. But it merely decided that no appeal lay against the order of the Collector made in the exercise of the powers derived from S. 320 (now Ss. 68, 70 and 71), Civil P. C. "The only question is by whom the power—to set aside the sale—is to be exercised:" 31 Bom 207 (2). In the other case, 35 Bom L R 761 (25), the power exercised by the Collector was under Sch. 3, § 1, Cl. (b), Civil P. C. Neither of those cases takes me any further than does R. 17 of the

18. Madho Prasad v. Hansa Kuar, (1883) 5 All 314.
19. Nathu Mal v. Lachmi Narain, (1886) 9 All 43.
20. Sheo Prasad v. Muhammad Mohsin Khan, (1902) 25 All 167=1902 A W N 225.
21. Narayan v. Rasulkhan, (1899) 23 Bom 531=1 Bom L R 33.
22. Tipangavda v. Ramangavda, 1920 Bom 130=54 I C 670=22 Bom L R 35=44 Bom 50.
23. Shantmurti Devappa v. Narayan Ramchandra, 1921 Bom 209=62 I C 221=45 Bom 1132=23 Bom L R 476.
24. Mancherji v. Thakurdas, (1905) 7 Bom L R 682.
25. Balkrishnadas v. Malakajappa, 1933 Bom 369=148 I C 507=35 Bom L R 761.

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Local Government, viz., that when the Collector passes an order under power conferred upon him no appeal lies.

The question to be decided in the case before me is not a question falling within the powers conferred on the Collector—it cannot be decided under any of the paragraphs of the schedule or in virtue of the powers conferred by the Government rules. It is difficult to conceive how the Collector can be considered to have power to determine the nature and incidents of inam service tenures. Some of the observations in 35 Bom L R 761 (25) are very general. But it could not have been intended that the Code and the Government rules (which are not referred to) should be interpreted in a sense transcending, I may say contradicting, their plain grammatical meaning: 31 Bom 207 (2) was not cited to the Court deciding 35 Bom L R 761 (25). 31 Bom 207 (2) explains the position clearly. In 35 Bom L R 761 (25) no reference is made to the difference in view of the Allahabad and Bombay High Courts; nor were the rules referred to in order to see whether the decisions in Allahabad were on rules similar to or different from those in force in Bombay. I come to the conclusion therefore that the Court retains jurisdiction and consequently the appeal lies, over the questions whether the lands are liable to be attached in execution; and whether the appellant has a saleable interest in them. These questions depend upon the tenure on which the lands are held. The tenure must be determined primarily by construing the sanad. The sanad is dated 1st July 1863. It was granted by command of Her Majesty, under the signature of the Governor of Bombay and it runs:

This sanad is issued . . . . to the effect that whereas in Koondurgee of talook Gokak in the Belgaum Collectorate certain land held as watan official emolument under the authority of the British Government is entered in the village accounts as follows:

Designation.—Bawasab wallad Isufsaheb Kajee.

Authority for permanent continuance.—Inam Committee decision.

No.—263 of 31st December 1852.

Field No.—21.

Measurement.—39-13.

Full assessment.—Rs. 54.

Out of which now paid to Government.—Nil.

It is hereby declared that the said land shall be permanently continued as the service emolument appertaining to the said office on the following conditions; that is to say, that the holders thereof shall perform the usual service and shall continue faithful subjects of the British Government. As this watan is held for the performance of service, it cannot be transferred, and in consequence no nazarana will be levied.

Dated at Bombay this first day of July in the year 1867.

The lower Courts held that the office of qazi is under Muhammadan Law not hereditary, 1 B H C R Appx 18 (26), 1 Bom 633 (27) and 3 Bom 72 (28), and that, therefore, there cannot be any grant implying that the office should be held hereditarily. But first the sanad does not speak of heredity. It speaks of the land as being permanently continued. The sanad has been granted under Bombay Act 11 of 1852, and Sch. B, R. (8), thereto states that:

Inams which form the authorised emoluments of any hereditary office, as of qazis, are not merely personal, but may be proved by local usage to be hereditary and are to be continued permanently.

The sanad provides for permanent continuance. It does not state that the office has been proved by local usage to be hereditary. Secondly, the original functions of the qazi, and the remnant of these functions exercised by persons now-a-days called qazis in India are different. This has been explained in the first Bombay High Court Reports. The word qazi is etymologically derived from the root word for decreeing, ordaining or judging, and qazi signifies one who gives decisions. It is the technical designation for a Judge (civil as well as criminal) in the texts. In addition, however, to his strictly judicial functions the qazi used (by amenity) to perform other functions such as officiating at marriages, superintending, talaks (occasionally keeping marriage records) and perhaps leading ceremonial prayers. These latter are the only functions now discharged by qazis in British India. Though Islam does not as a rule recognise an ordained priesthood or clergy, or require their ministration for the efficacy of any religious ceremony, and though the services of the qazi cannot of course be forced on any one, 3 Bom 232 (29), yet by most persons the presence of some religious officiant is considered desirable (or in a vague sense obligatory) and there is

26. Muhammad Yussub v. Sayad Ahmed, (1861) 1 B H C R Appx 18.
27. Jamal v. Jamal, (1877) 1 Bom 633.
28. Daudsha v. Ismailsha, (1878) 3 Bom 72.
29. Raja valad Shivapa v. Krishnabhat, (1879) 3 Bom 232.

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hardly any normal marriage at which the qazi or a religious dignitary is not present. It is thus obvious that the qazi's office entails in India the rendering of services to the community. This fact must not induce a closing of the eyes to the fact that when the ancient texts speak of a qazi they refer to a judicial office having entirely different functions from those of the religious officiant now spoken of as a qazi; and the applicability of the original texts to the question whether the office now known in India as that of a qazi should be hereditary may not be incontrovertible.

My views in regard to the heredity of such offices have been expressed in 38 Mad 491 (30) and 38 Mad 850 (31). Sadasiva Aiyar, J., took a somewhat different view from mine in the latter case, but that view has not been followed: see 41 Mad 886 (32). Though the qazi's office does not seem to have been involved in any decision of the Privy Council, their Lordships have frequently considered questions relating to ghatwal, which is:

> An office held by a particular person from time to time, who is bound to the performance of his duties with a consideration to be enjoyed in return by the incumbent of the office.

51 I A 37 (33). A very elaborate judgment was delivered in this case, by Lord Sumner. I shall have occasion frequently to refer to it. Such service may be for the village community: 10 M I A 16 (34) at 43. This description entirely accords with the office of the qazi in the present case. Speaking with reference to such an office Lord Sumner said, "Where everything depends upon personal qualifications and exertions a heritable tenure is out of place", 51 I A 37 (33), and yet he also said that "the . . . . tenure, even if not originally granted as heritable, easily becomes so": 51 I A 37 (33). Thirdly, what is perhaps in itself conclusive is that —under the Crown Grants Act (Act 15 of 1895), Ss. 2 and 3—all provisions, restrictions, conditions and limitations contained in grants by or on behalf of Her Majesty or the Secretary of State are valid, and take effect according to their tenor any rule of law, statute or enactment of the Legislature to the contrary notwithstanding. I ought rather to have said that the Crown Grants Act would have governed the construction of the sanad if hereditary devolution had been provided for, and if the question of devolution had been before me. But I see great difficulty in understanding why, for construing the sanad so far as necessary for the present case, the question of heredity should be introduced at all. What I have to decide is not how the office is to devolve—whether hereditarily or by selection or appointment: nor whether the office is to be held for life or for what other period: 3 Bom 72 (28) and 1 Bom 633 (27). I have only to determine whether, assuming that the judgment-debtor is the present incumbent the land is liable to attachment as if it were his private property. For this purpose, I have simply to determine the tenure of the incumbent for the time being. That depends upon construing the meaning of the words "permanently continued as the service emolument appertaining to the said office."

On the construction of the sanad the main contention before me was that it does not grant the land itself, but merely exempts from payment of assessment. It is however (in Lord Dunedin's words) a fantastic idea to turn the sanad into an exemption from assessment: 56 I A 51 (35). The land itself is stated as being held and continued to the holders. It is also stated that the watan cannot be transferred. The words of the document have to be distorted to give them the restricted meaning: 51 I A 357 (36), 46 I A 123 (37), 44 Bom 237 (38) and 34 Bom L R 959 (39). Mr. Kane asserts (as is likely) that there was, prior to the sanad, a grant by

30. Phatmabi v. Haji Musa Sahib, 1914 Mad 714 =21 I C 964=26 M L J 115=38 Mad 491.
31. Sundarambal Ammal v. Yogavana-gurukkal, 1915 Mad 561=23 I C 72=26 M L J 315= 38 Mad 850.
32. Annaya Tantri v. Anmakka Hengosu, 1919 Mad 598=47 I C 341=35 M L J 196=41 Mad 886 (F B).
33. Satya Narayan Singh v. Niranjan Chakravarti, 1924 P C 5=79 I C 825=51 I A 37= 3 Pat 183 (P C).
34. Joykishen Mookerjee v, Collector of East Burdwan, (1864) 10 M I A 16=1 Suth 542= 2 Sar 54 (P C).
35. Wadia v. Secy. of State, 1929 P C 34= 114 I C 1=56 I A 51=53 Bom 230 (P C).
36. Vajesingji Joravarsingji v. Secy. of State, 1924 P C 216=82 I C 779=51 I A 357=48 Bom 613 (P C).
37. Venkata Sastrulu v. Divi Seetharamudu, 1919 P C 111=51 I C 304=46 I A 123=43 Mad 166 (P C).
38. Amrit Vaman v. Hari Govind, 1920 Bom 41 =56 I C 411=44 Bom 237=22 Bom L R 275.
39. Narayan v. Shivshankardas, 1932 Bom 493 =139 I C 258=34 Bom L R 959.

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the Muslim or Maratha rulers. Therefore, it is argued, that the British Government could not grant what the grantee, already possessed. But the sanad contains a specific declaration with regard to the tenure on which the lands are to be held and the title to hold it. This will be clear when Act 11 of 1852 is examined, which I will presently do. It was contended that the words in the sanad, "the watan cannot be transferred" must be construed as meaning no more than that, in case the lands are transferred, the right to exemption from payment of assessment will be forfeited. This contention was pressed mainly with reference to the alleged purpose of Act 11 of 1852. The powers in exercise of which the sanad was granted are derived from that Act. The sanad refers to the Inam Committee's decision of 1852. It was in this connection pressed that the Inam Commission's function under Act 11 of 1852 was confined to exemption to assessment.

The heading of Act 11 of 1852 states that the Act is for the adjudication of titles to certain estates claimed to be rent-free. It recites the exception from the cognizance of civil Courts of claims (in certain districts) against Government on account of inams and other estates exempt from payment of land revenue, and the desirability of these claims being determined without delay. It provides for the appointment of an Inam Commissioner (S. 2) who shall, (subject to modification, reversal or annulment by the Governor (S. 5) investigate (S. 3 and Sch. A) in some respects as a civil Court (S. 5) titles to inams or jagirs or claims to exemption from Land Revenue (Sch. A, R. 1). The Commissioner shall receive from the holder of or claimant to lands exempt from revenue (Rr. 3, 5 and 6) or alleged proprietor (Rr. 4, 5, 7 and 11) statements and evidence to prove the nature of his title (Rr. 3 and 5) on penalty of the land being attached (Rr. 5, 7, 8 and 11). The evidence forthcoming or procurable, whether in favour of Government or of the claimants, shall be tested with the statements and entries (Rr. 9 and 10). Decision regarding the lands or interests (R. 10) shall then be passed, as shall seem just, as to continuance, resumption, or full or partial assessment of the lands (R. 9). Copies of decisions shall be delivered to claimants and sent to the mamlatdar or revenue manager (R. 12). Decisions affecting lands shall be carried into execution (R. 13). Appeals on grounds not of form, but justice of the decision lie within a hundred days of the decree (elsewhere called the decision) (R. 14).

In short the tribunal is established for a purpose to which Lord Shaw's words are applicable: "True the making of the (inam) register was for the purpose of determining whether or not the lands were rent-free. But it must not be forgotten that the preparation of this register was a great act of state:" 46 I A 204 (40). The Act itself refers to adjudicating as between the Government and the claimant or proprietor whether he has any title to hold land exempt from revenue. The title to hold inams and estates had to be first determined. Though the Government was concerned only with the assessment, the larger question of title was involved in that of exemption.

Section 4 and Sch. B provide how, in the adjudication, such titles shall be determined. The Scheme of Sch. B is not free from obscurity. But much light is derived, if (a) directions relating to the probative value of different categories of evidence are discriminated from (b) the forms of decisions that the Commissioner is empowered to give (Sch. A, R. 9). First as to the directions regarding the probative value that the evidence forthcoming or procurable must have in regard to the title (or tenure) on which the land is claimed to be held. The purpose for which the land is claimed to be held may indicate the persons entitled to hold, and the conditions of their tenure: whether it must be permanent. "Peculiar advantages" are conferred on institutions like mosques and temples: see 46 I A 204 (40). Specific provisions govern official tenure, or authorised emoluments of any hereditary office. To appreciate the rules or directions for attributing appropriate probative value to particular classes or pieces of evidence, the contemplated evidence may be formulated under separate—they are not mutually exclusive—categories. The schedule contemplates one or more of the following categories of evidence:

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40. Arunachellam Chetty v Venkatachalapathi Guruswamigal, 1919 P C 62=53 I C 288=46 I A 204=43 Mad 253 (P C).

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(1) A specific and absolute declaration by the British Government (R. 1: R. 4 pr. 1);

(2) a sanad (R. 2) from, or recognition by, competent authority (R. 7 pr. 1-3, R. 8 pr. 1-3 (4));

(3) title deeds or other records proving circumstances of original grant or inam (R. 7, pr. 1-3, 4, and R. 8 pr. 1-3) or proof of original valid title R. 7, pr. 7);

(4) prescriptive right (R. 4, pr. 3), or uninterrupted holding, or authorised possession (Rr. 3 and 4, pr. 1); or undisputed enjoyment (R. 4. pr. 2, R. 7, pr. 4, R. 8, pr. 4) for sixty or forty years (Rr. 3, 4); in the case of institutions (like mosques and temples) sufficient prescriptive enjoyment, though not full prescriptive title (R. 7, pr. 5 and 7): [length of enjoyment as inam by official person is not of itself sufficient title: R. 8, pr. 6];

(5) entry of the holding in genuine accounts of District Officers (though not passed or audited) as proof of authorised and uninterrupted possession or prescriptive right (R. 4, pr. 1 and 2), provided that the Collectorate accounts do not show it as unauthorised (R. 4, pr. 1); [in the case of institutions (R. 7, pr. 6) enjoyment may be proved by mere entry of inam (R. 7, pr. 4 and 5)];

(6) in the case of an institution, the permanent character of which is undoubted, evidence that the land is held for its support, though permanent continuance is not expressly provided for (R. 7);

(7) in the case of lands authorizedly held on official tenure (i. e. as emoluments for offices), evidence of local usage that the official tenure was meant to be hereditary, and has been so considered heretofore, though there be no sanad declaring it to be so (R. 8): e. g. inams which form the authorized emoluments of any hereditary offices as qazis, village joshis, etc. (R. 8, pr. 4 and 5); such inams are distinguished from:

(a) hereditary personal inams (R. 9, pr. 1), e. g. merely personal holdings of individuals in their own names for the performance of ceremonial worship (R. 7 pr. 6); from

(b) emoluments continued for service performed to the State (R. 7, pr. 5, R. 10); and from

(c) tenures of a political nature, e.g. khalsat, mahals, saranjams (rule 4, pr. 3), jahgirs (rule 10).

Secondly, if the evidence falls within the appropriate category, the Act confers on the Commissioner jurisdiction to give a decision or decree (schedule A, rule 14) in one of the following forms:

I. where a specific declaration of the British Government is in evidence, the land may be continued according to its terms (rule 1); or

II. where there is a sanad, the land may be continued according to its terms: declaring it hereditary (rule 2) or in perpetuity (rule 2, pr. 1) provided that the tenure can be observed without breach of the laws or public decency (rule 2, pr. 1-3); or

III. continued hereditarily or in perpetuity or permanently exempt (rules 1, 2, 7 and 8); or

IV. continued so long as there may be heirs male of the body (rule 3); or

V. continued for one further succession than the incumbent (rule 4); or

VI. continued for the life of the incumbent (rule 6, pr. 1); or

VII. in the case of lands resumed, continued as to a moiety for the life of a poor and destitute widow of the last incumbent (rule 9); or

VIII. in the case of a personal hereditary inam, continued for the life of the widow of an heirless proprietor (rule 9, pr. 1) or

IX. in the case of land governed by rules 1-4. it may be declared that it is not continuable (rule 6); or

X. in the case of land claimed for the support of a mosque or similar institution, the claim being found to be unsupported by proof of original title, and proved void of sufficient prescriptive enjoyment (rule 7, pr. 7), that it be resumed on the demise of the incumbent (rule 6); or

XI. in the case of land evidently held by fraud recently committed (e.g. resumed land re-occupied without authority or a pretended inam) that it be resumed at once (rule 6, pr. 2).

In the light of Act XI of 1852 and its Schedules each expression in the sanad

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reads like a Code word. For the language of the sanad follows the forms of decisions specified in the Act. The adoption of any particular form of decision depended (as I have explained) on the category under which the evidence before the Inam Commissioner was deemed to fall. So that from the form of decision adopted (i. e. the terms of the sanad) the nature of the evidence that led to the sanad being granted may be gathered.

The sanad recites that the land is held as watan official emolument, that it is so held under the authority of the Government and that there is the entry in the village accounts (which is set out) referring to the decision of the Inam Committee. These facts bring the evidence under categories (1), (2) and (5) above. That it is for the performance of service, distinguishes it from inams that are personal, or for service to the State, or tenures of a political nature: category (7). The words "permanently continued" have the specific significance given to them in forms of decisions I, II and III in contrast to form IX: see 46 I A 204 (40). The words imply that there was a previous grant which the British Government recognises and adopts.

The word 'watan' occurs twice in the sanad,—in the expression "lands held as watan official emoluments" and when it is said this "watan is held for performance of service." The word was used perhaps in a sense similar to the definition in S. 4 of the Watan Act, viz. "The watan property, if any, and the hereditary office and the rights and privileges attached thereto together constitute the watan." Prof. H. H. Wilson in his Glossary says: "Amongst the Marathas 'watan' has come to import any hereditary estate, office, privilege, property or means of subsistence." Both these definitions include office, and these words taken with the words in the sanad that "the said lands shall be continued as service emoluments appertaining to the said office," and with the condition that the holders shall perform the usual service, leave no doubt that there is a grant of an office remunerated by lands. (These are the words of Jackson, J., to the context of which I shall refer later). Whether it is called a grant, or merely a recognition of a pre-existing grant, the sanad is the result of an act of state. The condition of continuing faithful subjects is an indication of this. Conferring title or acknowledgment of title by Government stands on the same footing: 51 I A 357 (36). The new Government continues the old grants on condition of a transfer of allegiance. The subjects can make good only such rights as are recognised by the new State: 51 I A 37 (33).

The grant is to be a permanent one, as the office requires permanent succession. Whether the office is to devolve hereditarily or how is not mentioned. It may be that that incident must be considered as introduced by the use of the word "watan," or by schedule B, rule 8; or it may be that the absence of any reference in the sanad to the evidence of local usage to the effect that the official tenure on which the lands are held was meant to be hereditary, must be deemed to leave the door open for the general Muhammadan law which is opposed to the recognition of heredity. It may again be that the existence of local usage may be proved when the question arises. These questions do not, however, arise before me.

What the sanad confirms is a permanent grant. To that extent it is unquestionable. See S. 16, Cls. (D) and (E) of Bombay Act II of 1863. That Act and not Bombay Act VII of 1863 was applicable, since the lands in question were subject to the operation of Act XI of 1852 and there was the Inam decision 263 of 1852. The said Cls. (D) and (E) provide that Government shall be competent to determine any question that may arise in giving effect to the Act (in particular the question about continuing lands held for service); and that a final adjudication under Act XI of 1852—such as that referred to in the present sanad—shall be held to be a formal adjudication.

The sanad is dated 1st July 1867. It recites the entry of the current year and is based primarily on that entry: but that entry is statedly based on the decision No. 263 of the Inam Commission fifteen years before. That decision, given on evidence falling under three of the seven categories mentioned above, had stood for fifteen years as a "specific and absolute declaration by the Government." Whether there had beeen produced before the Inam Commissioner in 1852 any sanad or title deed it does

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not appear, and does not matter. That evidence could not have consisted merely of enjoyment: see category (4). Sir John Kay's reference to "that confiscatory tribunal known as the Inam Commission," has been perhaps sufficiently refuted: Etheridge's Inam Commission Government Selection (N. S.) 132 (1874), p. 64. There is, on the other hand, no reason to assume that the Commission recognized claims without evidence and in contravention of the directions in Act 11 of 1852: see R. 8. In any case, "What they did after investigation, not what they thought at the investigation, is the matter of moment": 51 I A 357 (36).

The question then is whether land held on such a tenure—as emolument for an office for service involving perpetual succession—is liable to attachment as private property. On principle the question seems to reduce itself to absurdity. It is notoriously difficult to find authority for what is clear: (1901) A C 240 (41). But the present question is not devoid of authority. These lands form remuneration for the discharge of functions in which the community is interested. In 13 M I A 438 (42) the Privy Council particularized for approval two passages out of five judgments in 6 W R 199 (43). Their Lordships expressed concurrence with (1) many of the general principles laid down by Peacock, C. J., who had emphasized the significance of the services being for the benefit of the public and not of the plaintiff alone, and (2) with Jackson, J. who distinguished the grant of an estate burdened with service, from the grant of an office the performance of whose duties are remunerated by the use of lands. The sanad before me fixes these lands as such remuneration. That is the significance of its being declared that the land cannot be transferred and no nazarana is levied. Where the grant is as remuneration for service, the holders at any time are bound to keep the estate unimpaired as a remuneration for service to the persons officiating and to pass it on unimpaired to each successive office-bearer: see 38 Bom 850 (31). Where the office is of a public character and held for the general good "it is necessary to ensure that the lands and the service shall remain substantially connected," so that actual performance is assured and "this involves that the lands must remain inalienable": 51 I A 37 (33); otherwise "the very end for which the grants were made would be defeated": 6 S D A 169 (44) approved in 51 I A 37 (33). As put in 48 I A 214 (45):

> When emoluments consists of land the land does not become the family property of the person appointed to the office whether in virtue of a hereditary claim to the office or otherwise. It is an appendage to the office, inalienable to the office holders and designed to be the emolument of the office into whose hands soever the office might pass.

Had the Inam Commission allowed the land to be transferred, the rights of the incumbent would have been enhanced and the Government entitled to nazarana. But doing so would have encroached on the rights of the community, presumably contravening the original grant. These general considerations are strengthened by characteristics of offices in Islamic law. The mutawalli of a wakf holds a position much more akin to a trustee than a kazi does. Courts in India had easily slided into the habit of considering the mutawalli as the owner of the land with an obligation annexed thereto (Indian Trusts Act, S. 3). But this was rectified by the Privy Council. The property is not vested in the mutawalli: 48 I A 302 (46), 47 I A 224 (47) If a mutawalli cannot claim ownership or do anything inconsistent with the object of the wakf, how can the acts of the kazi for the time being deleteriously affect the property set apart for the emoluments of future kazis? In 19 Bom 250 (48), where a cash allowance was attached, it was expressly stated that it may be open to Mohinuddin the kazi (though not to the defendant) "to urge that the allowance is appropriated as service remunera-

41. Keighley Maxsted & Co. v. Durant, (1901) A C 240=70 L J K B 662=84 L T 777=17 T L R 527.
42. Forbes v. Meer Mahomed Tuquee, (1870) 13 M I A 438=2 Suther 358=2 Sar 588 (P C).
43. Baboo Koolodeep Narain Singh v. Mahadeo Singh, (1866) 6 W R 199=B L R Sup Vol 559 (F B).
44. Hurlala v. Jorawan, (1837) 6 S D A 169.
45. Venkata Jagannadha v. Veerabhadrayya, 1922 P C 96=61 I C 667=48 I A 244=44 Mad 643 (P C).
46. Vidya Varuthi Thirtha Swamigal v. Balusami Ayyar, 1922 P C 123=65 I C 161=48 I A 302=44 Mad 831.
47. Muhammad Rushtam Ali v Mushtaq Husain, 1921 P C 105=57 I A 329=47 I A 224 =42 All 609 (P C).
48. Dharamdas Shambhudas v. Hafiasji, (1894) 19 Bom 250.

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tion and is non-transferable." Again stipendaries in Islam are not entitled to anticipate: Baillie I, 450, II. 100, 102, 109; Hedaya 143, 149; Durr-ul-Mukhtar, Ch. on Nafaka (fasl). This expressly refers to the kazi's maintenance.

An incident reported of Umar Abdul Aziz (96-105), the just Caliph, well illustrates the position. Unguarded charity during Ramzan, the month of fasts, is said to have so reduced the Caliph's means on the approach of the Ead festival as to make it impossible for him to give even to his family presents demanded by convention. He was thereupon induced by Fatima, his consort, to apply to the Beit ul-mal for payment of the current month's stipend a week before the end of the month. The Caliph is said to have received with humble submission this stern reply from his own fiscal officer:

> First produce the sanad from the Angel of Death, that thou shalt be permitted to live till the end of the month; and send me a certificate that thou hast performed the duties in respect of which thou seekest the emoluments.

This incident is related with pride to Muslim audiences who listen to it unquestioningly. It strikingly presents the legal position of emoluments for office in the law of Islam, even though the anecdote may be apocryphal. The emoluments become the property of the kazi only after he discharges his duties. Till he has earned them he has no right over them. His right over the emoluments ripens only with possession. The lands themselves do not belong to the kazi. He is merely entitled to take the produce accruing while he holds the office. Moreover the kazi cannot claim an indefeasible right to the emoluments being removeable from his office as kazi: Regn. 26 of 1827, S. 2, and 1 Bom 633 (27), 10 M I A 16 (34), 51 I A 37 (33) and 9 I A 104 (49).

I have referred several times to 51 I A 37 (33). At pp 58 and 59 of the report Lord Sumner formulates the propositions derived from an examination of the authorities. One of these propositions is: "A tenure so granted", [viz. as consideration for performance of duties by a person from time to time bound to perform them: 51 I A 37 (33),]

> is inalienable and indivisible : 6 S D A 169 (44), and cannot be sold in execution of a decree against the person of the incumbent of the office of ghatwal for the time being : See 9 I A 104 (49) [in appeal from 5 Cal 389 (50)] and 10 M I A 16 (34).

"Their Lordships are of opinion," Sir B. Peacock had said (at p. 124) in 9 I A 104 (49), to which Lord Sumner refers,

> that the tenure is not transferable or saleable in execution of a decree. If the lands were transferable by voluntary sale or sale in execution or otherwise there would be no security that the transferee would be a proper person to discharge the duties in respect of which the lands are held :

The principle that, where a tenure is created, as distinct from a mere personal employment, the services are in the nature of a public obligation which cannot be waived is enunciated in 51 I A 37 (33) " The public also had a great interest in their maintenance," 10 M I A 16 (34). Sir John Edge refers to alienation which is prohibited in the interests of the state : 50 I A 255 (51).

Reliance was placed by the respondent on 16 Bom 649 (52). But there all that was decided was that the civil Courts had jurisdiction to decide, what the Inam Commissioner had of course not to determine, who was entitled to succeed under the terms of the sanad. 18 Bom 103 (53), construes certain resolutions of the Government which contained words to the effect that the lands " may be resumed." It was held that the Collector by purporting to take away the land from the person who was holding it acted beyond the powers conferred upon him by the resolution, as it was explained in another Government resolution that by these words he was authorized merely to enhance the assessment to the normal assessment. This is in accordance with the general law as well as what the analysis of Act 11 of 1852 indicates. Government on finding that there was no inam could only resist the claim to exemption ; they could not take away, possession from the person who was in possession unless they could establish a superior title. In 21 Bom L R 1159 (54),

49. Rajah Nilmoni Singh v Bakranath Singh, (1882) 9 I A 104=9 Cal 187 (P C).

50. Bukronath Singh v. Nilmoni Singh, (1879) 5 Cal 389.

51. Madhavrao v. Raghunath, 1923 P C 205 = 74 I C 362=50 I A 255=47 Bom 798.

52. Irappa bin Malappa Naik v. Appasaheb Irbasappa, (1891) 16 Bom 649.

53. Baba Kakaji Shet Shimpi v. Nassaruddin, (1893) 18 Bom 103.

54. Mahomadsaheb v. Secy. of State, 1920 Bom 147 = 54 I C 98 = 44 Bom 120 = 21 Bom L R 1159.

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the sanads granted in 1852 and 1867 expressly reserved the right of a person to whom the lease had been transferred in 1835. The decision proceeded on the construction of the sanads which saved the right of the transferee. None of these cases affect the question before me or help to construe the sanad before me.

The examination of Act 11 of 1852 makes the meaning of every word of the sanad so clear that I may be charged with supererogation in having examined these cases. The construction is amply corroborated by general principles enunciated by the Privy Council. Construing the sanad on its own terms, the lands cannot be transferred; they are to remain intact as emoluments annexed to the office. The words "and in consequence no nazarana will be levied" show that no transfer was contemplated or allowed. The last point argued before me was that in any case the right, title and interest of the defendant in this property should be attached and sold. But the sanad prevents this being done. Giving effect to the sanad requires that these lands shall (in the interests of the community and presumably in accordance with the terms of the original grant) be preserved unimpaired as emoluments for the holder of the office. They are not transferable. It is impossible to give any interest in them except to a person holding the office. It is only after the emoluments have come to the hands of the defendant and become his property, that they can be attached in execution of a decree against his person; not before. This appeal will be allowed with costs throughout. The sale is set aside. I declare that this case is a fit one for appeal under Cl. 15 of the Letters Patent.

Letters Patent Appeal.

Broomfield, J.—This is an appeal in execution proceedings raising the question of the liability of Kazi watan land to be sold in execution. The material facts are very few. The appellant in this Letters Patent appeal brought a suit against the respondent in 1925 and got three fields in the possession of the respondent attached before judgment. He obtained a decree on 26th August 1926. It was a decree for money, but it provided that the attachment on the free fields was to continue until the decree was satisfied. In execution proceedings the Court ordered that one of these fields, Survey No. 82, plot No. 1, which is Kazi watan land, should be sold. This order for sale was made on 8th August 1928. Execution of the decree was then transferred to the Collector. Defendant made an application to the Collector contending that the land was not liable to be sold, but the Collector rejected his application, and the land was sold on 26th June 1930. In the meantime, on 16th April 1930, the defendant had applied to the Subordinate Judge repeating the contentions which he had made before the Collector, viz., that as the land in question is inam granted to the defendant as Kazi service emolument and as it is non-transferable by the terms of the sanad, it cannot be sold. The Subordinate Judge held, on 8th September 1930, that there was no legal bar to the defendant's interest in the land being attached and sold in execution of the decree against him. Subsequently, on 25th September 1930, the Collector confirmed the sale. There was an appeal from the Subordinate Judge's order to the District Judge who agreed with him and held that the land is liable to be sold. On second appeal, however, Tyabji, J., took the other view and has set aside the sale.

The first part of his judgment is an exhaustive examination of the law relating to the powers of the Collector in execution proceedings transferred to him. We do not consider it necessary to accompany the learned Judge over this ground. There may of course be cases in which there is room for doubt as to the respective powers of the Collector and the Court, but in the present case we think the matter presents no difficulty. The Court had ordered the sale of this land which had been attached before judgment. In exercise of the powers conferred by Sch. 3 the Collector could postpone the sale, or let or mortgage the land instead of selling it or sell part of it only. But it was not open to him to allow the validity of the order for sale to be questioned. In that respect he can be in no better position than a Court executing a decree transferred to it; he cannot go behind the decree. Conversely, as it is not within the Collector's competence to consider this question, it must be open to the Court to consider it, on a proper application and assuming that there is no bar of res judicata. The mere fact

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that the carrying out of the Court's order has been delegated to the Collector cannot deprive the Court of jurisdiction to consider the validity of the order. If any authority is required for these propositions, it will be found in 20 All 428 (55). The only point of this kind which could really arise is whether it was open to the defendant to question the validity of the Court's order for sale by an application in execution when he had not appealed against the order.

But that particular point has not been taken in any of the lower Courts and in accordance with the usual practice we have declined to allow it to be taken in the Letters Patent appeal. Mr. Kane, who appears for the appellant, cited 57 All 77 (56) in support of his right to argue the point before us. In that case some decisions of the Privy Council have been referred to, but we do not think that there is anything in these cases which affects the power of the High Courts to decide what matters they will consider in a Letters Patent appeal. A Full Bench of the same High Court in 54 All 25 (57) has recognized the practice according to which new points are not to be allowed to be raised in such appeals, though it was held that that practice does not mean any absolute prohibition. In 36 Bom L R 1052 (58) our own High Court has held that in an appeal under the Letters Patent the appellant is not entitled to be heard on points which had not been raised before the Judge from whose judgment the appeal has been preferred. 11 Lah 535 (59) was followed. We think the practice is salutary and we see no reason why we should depart from it in this case. We must take it therefore that the question whether the land is liable to be sold is still open for consideration on the merits. That question depends upon the construction of the sanad which is set out at p. 6 of the print. The sanad which is dated 1st July 1867 begins by reciting that certain land held as watan official emolument under the authority of the British Government is entered in the village accounts. Details of the land are then given. In the column for "designation of office" the name of the defendant's ancestor is given. The authority for permanent continuance of the grant is given as the Inam Commission's decision, No. 263 of 31st December 1852. Then there are details of the land, field No. so and so, measurement so and so and assessment so and so. Then follows this provision :

It is hereby declared that the said land shall be permanently continued as the service emolument appertaining to the said office on the following conditions ; that is to say, that the holders thereof shall perform the usual service and shall continue faithful subjects of the British Government. As this watan is held for the performance of service, it cannot be transferred, and in consequence no nazarana will be levied.

The sanad is in the ordinary form for grants to village servants useful to the community and is so printed in Joglekar's Alienation Manual at p. 311. As I have mentioned, the person whose name appears under the heading "designation of office" is defendant's ancestor and it is not disputed that the land has descended from father to son. It is also not disputed that the defendant performs the duties of a Kazi. Mr. Kane contends however that he is not legally a Kazi because the office of Kazi, under Mahomedan law and as held by the Courts, is not hereditary and the defendant has not been appointed Kazi by anybody. Therefore, he says, in spite of the terms of the sanad, his interest in the land can be sold. Tyabji, J., points out in his judgment that when the ancient texts speak of a Kazi they refer to a judicial office having entirely different functions from those of the religious officiant now spoken of as a Kazi ; and the applicability of the original texts to the question whether the office now known in India as that of a Kazi should be hereditary may not be incontrovertible. There is a special Act, the Kazis Act 12 of 1880, under which appointments of Kazis may now be made, although the Act does not confer on the Kazi the exclusive right to perform functions which his office requires him to discharge. This Act has been applied to some parts of the Bombay Presidency but apparently not to the District of Belgaum with which we are

55. Onkar Singh v. Mohan Kuar, (1898) 20 All 428=1898 A W N 96.
56. Parbhu Lal v. Badri, 1934 All 719=149 I C 315=57 All 77.
57. Mahabir Sing v. Dip Narain Tewari, 1931 All 490=134 I C 236=1931 A L J 715=54 All 25 (F B).
58. Shripad v. Shivram, 1934 Bom 466=152 I C 1031=36 Bom L R 1052.
59. Teja Singh v. Gurcharan Singh, 1930 Lah 632=128 I C 57=11 Lah 535=31 P L R 281.

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concerned. That being so, it seems to be a matter of doubt whether any valid nomination to the office of Kazi could now be made.

However that may be, the question whether the defendant is legally entitled to hold the office of Kazi or not does not appear to be relevant as between the parties to this litigation. The sanad declares that the land shall be permanently continued as service emolument appertaining to the office of Kazi. Defendant is at any rate a de facto Kazi and is performing services as such. If he is not legally entitled to perform those services, it may be open to the Government which granted the sanad to resume the grant. What the effect of resumption would be, whether defendant might be turned out of possession or merely required to pay full assessment, I need not consider. As long as the sanad remains in force, I cannot accept Mr. Kane's contention that the land can be transferred to a person like the plaintiff who has nothing to do with the office of Kazi and is not even a Mahomedan. That would be inconsistent with the plain terms of the grant. Nor can I see any force in the distinction which the learned advocate attempts to draw between the sale of the land and the sale of defendant's right, title and interest in it. Nothing more than the interest of the defendant in the land could of course be sold in execution of a decree against him. But the practical effect of the sale would be that the land would cease to be available as remuneration for the Kazi's services and that is contrary to the sanad.

The other line of argument for the appellant is that the Inam Commission only dealt with the right of exemption from paying the assessment and that the expression "permanently continued" in the sanad did not apply to the land but only to the continuance of the exemption. Tyabji, J., has sufficiently disposed of that argument in his discussion of the provisions of Act 11 of 1852 and of the authorities. I think it is only necessary to say that the plain language of the sanad negatives the construction which Mr. Kane wishes us to place upon it. The land is the watan official emolument, the land is to be permanently continued, and the watan, which in the context can only mean the land, cannot be transferred. Mr. Kane is unable to explain how, if the watan meant merely exemption from assessment as he says, it could possibly be transferred apart from the land. He can only say that if the land is transferred the exemption would cease. But that is not what the sanad says. No case has been cited to us in which the Court has construed a sanad in this form and held that the land can be sold. We think therefore that Tyabji's, J.'s decision is right and dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

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B. J. WADIA, J.

Manilal Lallubhai and *others*—Appellants.

v.

Bharat Spinning & Weaving Co., Ltd.—Respondents.

Award No. 106 of 1931, Decided on 10th September 1935.

(a) Costs—Taxation—Defendants appearing by same attorney can have one bill of costs however diverse their interests may be—They may be represented by separate counsels if their interests are diverse—Prima facie each person holding himself out as partner has right to defend himself separately—Test is whether interests of parties are identical or whether before proceedings commenced there was reasonable probability of their defences being substantially different.

Defendants appearing by same attorney, however numerous or diverse their interests may be, can have but one bill of costs; but this will not limit their representation in Court. If their interests are diverse, separate counsel may appear for them and their charges will be allowed. Prima facie each person alleged to be a partner or to have held himself out as a partner has a right to defend himself separately. [P 244 C 2 ; P 246 C 1]

The test is whether the interests of the parties are identical or whether before the hearing commenced there was a reasonable probability of the defences being substantially different. The fact that the parties sign separate retainers is a matter for consideration in determining whether their interests are identical, but it is by no means conclusive. The question is whether the attorneys were justified from the commencement in having a reasonable apprehension that the cases of their clients were not identically the same. What is a reasonable apprehension cannot be defined. Each case turns on its own facts and no definite rules can be laid down to punish parties who do not join in their defence. All that the taxing master has to see is that the parties have not unnecessarily augmented costs by each filing separate appearances: 1933 *Bom* 92; *Greedy* v. *Lavender*, (1848) 11 *Beav* 417 and *A. G. Spalding* v. *A. W. Gamage, Ltd.*, (1914) 2 *Ch* 405, *Ref.* [P 244 C 2 ; P 245 C 1, 2]

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The test really is whether the interests of the parties were identical, or whether before the hearing commenced there was a reasonable probability of the defences being substantially different. Counsel for the appellants argued that there was no justification even for the appearance of the two appellants by separate counsel in the Court below, for the record showed that the cross examination of the witnesses, the arguments advanced, and the authorities or almost all the authorities cited on behalf of appellant 1 were adopted by counsel who appeared for appellant 2. He also said that appelant 2 was examined as a witness on behalf of appellant 1 which showed how identical their interests were. He further argued that at the utmost the Court should only allow the appellants the costs of the briefing charges for the two counsel, but not a separate set of costs in respect of the items allowed by the Taxing Master.

The Taxing Master in his judgment has stated that the retainers signed by the two alleged partners, Manilal and Madhavlal, in favour of the attorneys are separate. They did not sign one joint retainer. That is certainly a matter for consideration in determining whether the interests of the two parties who signed two separate retainers were identical, but it does not necessarily follow from the fact that two retainers were separately signed that the interests of the two parties cannot be identical. Otherwise it might be said that even parties who were really in the same interest should be entitled to separate sets of costs, if only they went on separate days to the same attorneys and signed separate retainers. I do not think that the judgment of the Taxing Master is based solely on that consideration. The test which he applied was to ascertain whether before the trial commenced there was a reasonable probability of a substantial difference in the defences. I do not agree with the respondents' counsel that the only test of the identity of interests is to consider what actually happened at the trial at every stage of the proceedings. The question is whether the attorneys were justified from the commencement in having a reasonable apprehension that the cases of their two clients were not identically the same. It was argued that in that case they should have kept one client and sent away the other to a different firm of attorneys, but I do not think that there was such a conflict of interest as to necessitate appearance by separate sets of attorneys. They were not claiming anything one against the other. They were interested in fighting the respondents, but in the fight various considerations might have to be urged on behalf of the one which might not have to be urged on behalf of the other. What is a reasonable apprehension cannot be strictly defined and the following observations made by the Master of the Rolls in 11 Beav 417 (2) are pertinent in this connexion (pp. 419-20):

> Parties in the same interest ought to join in their defence ; but it is found almost impossible to lay down any rule to punish parties who do not join in their defence. The protection of the suitor is in the discretion and honour of counsel and solicitors. There are such shades of difference—such nice distinctions, that the Court can seldom come to a satisfactory conclusion. When the point has been brought before me, I have experienced great difficulty in punishing persons for not joining somebody else in their defence.

Keeping this difficulty in mind, I would say that all that the Taxing Master has to see is that the parties have not unnecessarily augmented costs by each filing a separate appearance. It was pointed out that except for the difference in the name of the two appellants there were identically the same affidavits on the chamber summons. That is not conclusive, because if the two appellants signed retainers separately in favour of the same attorneys, and one affidavit is sent to the opposite side before the other, it may well be that the affidavits are almost identically the same. It was further pointed out that only one counsel appeared on the chamber summons, that there was one summons for particulars, that there was one appeal between the two appellants, that at the hearing before Kania, J., one counsel did all the work and the other had to do little if at all. This is an argument which cuts both ways ; it shows that wherever possible, extra costs have been saved and not incurred. On the other hand it was also pointed out by the counsel for the appellants that Mr. M. S. Vakil, who appeared for appellant 2 in the Court below, did argue his client's case, and that he did

2. Greedy v. Lavender, (1848) 11 Beav 417=18 L J Ch 62.

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that the costs separately incurred on behalf of appellant 2 in the Court below should not be allowed between party and party on the ground that they were incurred merely at the desire of the party, viz. appellant 2 Madhavlal Lallubhai, and need not have been incurred at all. It is further contended that the interests of the two appellants were identical, and no separate work was done by counsel who appeared for appellant 2 at the trial of the issues. The appellants' counsel contends that there are really two bills of costs and not one. I do not think it can be correctly said that there are two separate bills of costs for the two appellants. There is only one bill as is stated in the chamber summons, but the bill is divided into two parts on behalf of the two appellants. It is also not correct to say that this is a double set of costs, one for Manilal Lallubhai, appellant 1, and another identically the same for Madhavlal Lallubhai, appellant 2. It was pointed out that in many cases the items in the bill have been divided into halves between the two appellants. Some items have been allowed separately to the two appellants when they could not be divided into halves.

The separate items in the bill are not in dispute before me on this chamber summons. They have been pointed out by the one party or the other merely in support of their contentions. To take for instance the main item in respect of instruction charges, the attorneys for the appellants put down the figure of Rupees 3,750 for each of the two appellants separately. The Taxing Master has allowed Rs. 2,750 for instruction charges on behalf of appellant 1 and Rs. 1,250 on behalf of the other. I take it to be the usual practice of his office that before the item for instruction charges is settled by him he looks at the brief given to counsel at the hearing, and goes through the observations and instructions to counsel contained in the brief. The important point for consideration is one of the principles of taxation on which the bill has been taxed. The Taxing Master had to decide whether the appellants were justified not only in briefing two counsel for the two appellants separately at the hearing of the issues before Kania, J., but in incurring separate sets of costs in respect of various items mentioned in the bill for each of the two appellants. I have already stated that with regard to the costs of the hearing in the Court below, the only order made by the appeal Court was that the respondents should pay the appellants' costs of the appeal. It was therefore argued that the appeal Court had impliedly disallowed separate sets of costs for the two appellants. I do not think that that conclusion necessarily follows. Kania, J., could not have dealt with the point of separate sets of costs, because he held in favour of the respondents, and ordered the appellants to pay their costs

The appeal Court must have been well aware that counsel had appeared separately for the two appellants in the Court below, but it is common ground that neither the appellants nor the respondents argued before the appeal Court whether two sets of costs should be allowed or only one. The Taxing Master therefore had to consider on principle whether the facts and circumstances of this case and the contentions of the parties made it a reasonably necessary expense for the employment of counsel for the two appellants separately, and also for incurring separate sets of costs for the two appellants from the time the warrant was signed by each in favour of the attorneys, or whether it was an unusual or extraordinary expense. The principle of taxation on which costs of briefing separate counsel are allowed is laid down in the Guide to Costs by Porter and Wortham, Edn. 13, at p. 920, as follows:

> Defendants appearing by the same solicitor, however numerous or diverse they or their interests may be, can have but one bill of costs; but this will not limit their representation in Court. If their interests are diverse, separate counsel may appear in Court, and their charges will be allowed.

The test in such cases is, as was pointed out by me in an earlier judgment in 35 Bom L R 93 (1), whether there is a reasonable probability of there being a substantial difference in the two defences. In my opinion the same test should also apply in considering whether the attorneys were justified in incurring separate sets of costs in respect of various items for the two appellants, not altogether separate sets of costs, one identical with the other, but separate in respect of various items wherever necessary.

1. Gorakhram v. Pirozsha (No. 1), 1933 Bom 92 =142 I C 353=57 Bom 570=35 Bom L R 93.

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The test really is whether the interests of the parties were identical, or whether before the hearing commenced there was a reasonable probability of the defences being substantially different. Counsel for the appellants argued that there was no justification even for the appearance of the two appellants by separate counsel in the Court below, for the record showed that the cross examination of the witnesses, the arguments advanced, and the authorities or almost all the authorities cited on behalf of appellant 1 were adopted by counsel who appeared for appellant 2. He also said that appellant 2 was examined as a witness on behalf of appellant 1 which showed how identical their interests were. He further argued that at the utmost the Court should only allow the appellants the costs of the briefing charges for the two counsel, but not a separate set of costs in respect of the items allowed by the Taxing Master.

The Taxing Master in his judgment has stated that the retainers signed by the two alleged partners, Manilal and Madhavlal, in favour of the attorneys are separate. They did not sign one joint retainer. That is certainly a matter for consideration in determining whether the interests of the two parties who signed two separate retainers were identical, but it does not necessarily follow from the fact that two retainers were separately signed that the interests of the two parties cannot be identical. Otherwise it might be said that even parties who were really in the same interest should be entitled to separate sets of costs, if only they went on separate days to the same attorneys and signed separate retainers. I do not think that the judgment of the Taxing Master is based solely on that consideration. The test which he applied was to ascertain whether before the trial commenced there was a reasonable probability of a substantial difference in the defences. I do not agree with the respondents' counsel that the only test of the identity of interests is to consider what actually happened at the trial at every stage of the proceedings. The question is whether the attorneys were justified from the commencement in having a reasonable apprehension that the cases of their two clients were not identically the same. It was argued that in that case they should have kept one client and sent away the other to a different firm of attorneys, but I do not think that there was such a conflict of interest as to necessitate appearance by separate sets of attorneys. They were not claiming anything one against the other. They were interested in fighting the respondents, but in the fight various considerations might have to be urged on behalf of the one which might not have to be urged on behalf of the other. What is a reasonable apprehension cannot be strictly defined and the following observations made by the Master of the Rolls in 11 Beav 417 (2) are pertinent in this connexion (pp. 419-20):

> Parties in the same interest ought to join in their defence; but it is found almost impossible to lay down any rule to punish parties who do not join in their defence. The protection of the suitor is in the discretion and honour of counsel and solicitors. There are such shades of difference—such nice distinctions, that the Court can seldom come to a satisfactory conclusion. When the point has been brought before me, I have experienced great difficulty in punishing persons for not joining somebody else in their defence.

Keeping this difficulty in mind, I would say that all that the Taxing Master has to see is that the parties have not unnecessarily augmented costs by each filing a separate appearance. It was pointed out that except for the difference in the name of the two appellants there were identically the same affidavits on the chamber summons. That is not conclusive, because if the two appellants signed retainers separately in favour of the same attorneys, and one affidavit is sent to the opposite side before the other, it may well be that the affidavits are almost identically the same. It was further pointed out that only one counsel appeared on the chamber summons, that there was one summons for particulars, that there was one appeal between the two appellants, that at the hearing before Kania, J., one counsel did all the work and the other had to do little if at all. This is an argument which cuts both ways; it shows that wherever possible, extra costs have been saved and not incurred. On the other hand it was also pointed out by the counsel for the appellants that Mr. M. S. Vakil, who appeared for appellant 2 in the Court below, did argue his client's case, and that he did

2. Greedy v. Lavender, (1848) 11 Beav 417=18 L J Ch 62.

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ask questions of his own client over and above the questions that were asked by Mr. Lalji on behalf of appellant 1. The issues that were raised, which I have referred to before, also show that there was some divergence of interest between the two appellants. There is a divergence of interest appearing also from the further and better particulars of the holding out which were furnished by the respondents. In some cases it is appellant 1 with some other party or parties who made the representation ; in other casas it is both the appellants, or appellant 1 and/ or appellant 2, or appellant 2 alone.

The judgment of Kania, J., also differentiates between the cases of the two appellants. In my opinion prima facie each person alleged to be a partner or to have held himself out as a partner has a right to defend himself separately. No doubt the two appellants are brothers, but could it be said that one brother was entirely safe and justified in entrusting his defence to the counsel for the other? Could it also be said that there was no reasonable probability that one might be held to be liable, whereas the other might have had judgment pronounced in his favour? Counsel for the respondents argued that one counsel could have done the work for both, and that it often happened that where one counsel appeared for two parties, only one was held liable and the other was not. That does happen in some cases, but where there is a reasonable probability from the commencement of the trial of a difference in the two defences, it is also probable that a situation may arise when it may be embarrassing for the same counsel to throw himself first into the defence of the one client and afterwards into that of the other, although there may not be any material incompatibility between them. That was pointed out by Sargant, J., in 2 Ch 405 (3). There are cases in which it has been held that parties are not entitled to sever, but each case must depend on its own facts and circumstances. It is provided by R. 546 (i) of our High Court Rules that :

No costs are to be allowed on taxation which do not appear to the Taxing Officer to have been necessary or proper for the attainment of justice or defending the rights of the party or which appear to the Taxing Officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party.

It has been held that this rule applies to taxation between party and party: 27 Bom L R 1195 (4). In my opinion the costs incurred on behalf of the two appellants separately were proper for defending the rights of either of them. I agree with the Taxing Master that a certain amount of latitude has to be allowed to the solicitors in considering before the commencement of the proceedings whether there is a reasonable probability of the defences being different or not. I do not think a solicitor can always foretell exactly how the case will shape as it proceeds, especially when there is the chance of a long hearing. Moreover, I have already stated that there is not in this case a double set of costs in the sense that the costs incurred on behalf of one appellant are identically the same as the costs incurred on behalf of the other. I have not gone into the items separately, as no particular item is objected to. The question is one of principle, and in the principle which the Taxing Master has adopted I think he was substantially correct. In respect of the items of costs the Taxing Master has to use his discretion, and the Court does not lightly interfere with that discretion except in extreme cases where there has been gross abuse or serious mistake or when he has acted on a wrong principle or applied an altogether wrong consideration. In the result the summons must be dismissed with costs. Counsel certified. Costs to be taxed.

R.M./R.K. *Summons dismissed.*

3. A. G. Spalding v. A. W. Gamage, Limited, (1914) 2 Ch 405=83 L J Ch 855=111 L T 829=58 S J 722.

4. Parashuram Shamdasam v. Tata Industrial Bank, 1926 Bom 18=91 I C 153=50 Bom 69=27 Bom L R 1195.

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MACKLIN, J.

Chandulal Damodardas and *others*—Defendants—Appellants.

v.

Keshavlal Kuberdas Amin and *others*—Plaintiffs—Respondents.

Second Appeal No. 386 of 1932, Decided on 5th December 1935, from decision of Assist. Judge, Ahmedabad, in Appeal No. 79 of 1930.

(a) Companies Act (1913), S. 4—"Sub-partners" are not partners.

Sub-partners are not members of a firm and the existence of a sub-partner would not affect

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the number of members of a firm for the purposes of S. 4, Companies Act: 1927 *Mad* 123, *Disting.* [P 248 C 2]

(b) Transfer of Property Act (1882), Ss. 105 and 107—Oral agreement to lease creating immediate demise of property is lease—Though void as transfer for want of writing and registration, it is valid as agreement to lease.

An agreement to lease creating an immediate demise of the property and operating as an actual transfer amounts to lease within S. 105 and is void if it is not in writing and registered under S. 107. But the agreement though void regarded as a transfer of property may yet be valid regarded as an agreement: 1931 *P C* 79, *Foll.* [P 248 C 2; P 249 C 1]

(c) Civil P. C. (1908), O. 30, R. 9—Suit by firm against another firm having common partner—Suit is not maintainable—Exception in equity.

Where a person is a common partner in two firms, no action can be brought by one firm against the other firm upon any transaction which was between them while such individual was a common partner. This rule is however subject to an exception in equity in certain cases where it might be possible to ascertain the rights and liabilities of a member of a firm when all the parties are before the Court, but the above equity does not apply in case which cannot be adequately dealt with merely by a declaration of right to a credit in partnership accounts: 25 *Bom* 606, *Foll.* [P 249 C 2]

(d) Civil P. C. (1908), O. 30, R. 9—Suit for specific performance of lease between firm and its partner is not saved.

A suit for specific performance of an oral agreement to lease, entered into by a firm with one of its partners, is not saved by O. 30, R. 9. [P 250 C 1]

G. N. Thakor and *P. A. Dhruva*—for Appellants.

H. H. Dalal and *D. V. Patil* for *U. L. Shah*—for Respondents 1 to 11.

Judgment.—The suit which has given rise to this second appeal was brought by the members of the firm known as "The Bavla Gujarat Cotton Press" for the specific performance of an oral agreement for a lease entered upon between the firm and one of its members, defendant 1. The agreement took place on 21st September 1925, and it has been found as a fact by the Courts below that its terms were that the plaintiff firm should take the property upon lease for fifty-one years beginning from the date of the agreement at an annual rent of Rupees 308-12-0, and that a formal lease was to be executed; but there is a finding that the date for the execution of the lease was left indefinite and that it depended upon defendant 1 himself having a title to convey upon the Thakore (who is admittedly the owner of the land) letting it first to Naran, and Naran then letting it to defendant 1. A number of defences were raised but were overruled, and the execution of a registered lease was ordered.

In this second appeal by defendant 1 four points are urged: (1) that the plaintiff firm consists in fact of more than twenty members, and, therefore, under S. 4, Companies Act, it cannot be recognized for want of registration of the company and cannot bring this suit; (2) that the agreement upon which the plaintiffs rely was not so much an agreement for a lease as an actual lease, and it is void for want of writing and registration under S. 107, T. P. Act; (3) that the agreement is indefinite in its terms, and both for this reason and because three years have elapsed from the time when it became enforceable (assuming that it was enforceable) it cannot now be enforced, and (4) that defendant 1 is himself a member of the firm with whom the agreement was executed and thus occupies the position both of plaintiff and of defendant, and therefore the present suit is bad.

On the first point there is no direct authority applicable to the present case in the cases decided in India. The question arises in this way. There are in the list of plaintiffs eleven persons named as members of the firm. Among the defendants, defendants 1, 2 and 3 are members of the company, so that there are really at least fourteen members of the company. But plaintiff 3 is "The Bavla Vishnu Cotton Ginning Factory," and in reply to a question put by the defendants asking for information as to the number of members of the Bavla Vishnu Cotton Ginning Factory it was stated that the firm consisted of four principal partners, of whom Keshavlal Hirachand had two sub-partners and Vithaldas Khushaldas had three sub-partners. Now it is incontrovertible that the members of the firm of the Bavla Vishnu Cotton Ginning Factory must be treated as members of the company of which the firm is a member. If an authority for this is needed, it is to be found in 50 Mad 175 (1). That case had an offshoot under a similar name in the Bombay Presidency, and has

1. Pannaji Devichand v. Senaji Kapurchand, 1927 Mad 123=99 I C 640=51 M L J 667=50 Mad 175.

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been reported in 36 Bom L R 786 (2); and eventually the Madras case went in appeal to the Privy Council, and the appellate judgment (which merely accepts the reasoning of the High Court of Madras and dismisses the appeal) has been reported in 32 Bom L R 1607 (3). The case is relied upon by the learned counsel for defendant 1 as dealing with a situation which is analogous to the present situation. There is no difficulty about deciding that the members of the Bavla Vishnu Cotton Ginning Factory are members of the plaintiff firm. But there is some difficulty in deciding whether the sub-partners of Keshavlal and Vithaldas are members of the Bavla Vishnu Cotton Ginning Factory. If they are members, then the plaintiff firm consists of more than twenty members. The reasoning adopted in 36 Bom L R 786 (2) for holding that the individual members of the four firms which entered into the partnership in that case were themselves members of the partnership and that the partnership, consisting as it did of more than twenty individual members, required registration under S. 4, Companies Act, was that the word "persons" used in S. 4 (2) of the Act was used not in the sense in which it is defined in the General Clauses Act (in which Act it includes a corporation or a body of persons) but in the sense of an individual, and that what the section prohibited was an unregistered association of more than twenty individuals. It is argued that on the analogy of this case the sub-partners of the two members of the Vishnu Cotton Ginning Factory must be regarded as individual members of the Bavla Vishnu Cotton Ginning Factory.

The determination of the question depends upon the position of sub-partners. The point was raised at a late stage in the trial after all the evidence had been taken, and there is no evidence to show exactly what part the sub-partners took in the business. But as they have been described as sub-partners, it is reasonable to take it that they were in fact what is usually meant by a sub-partner. A sub-partner is described in "Lindley on Partnership", Edn. 10, at p. 66: he is a stranger who agrees with one of the partners of the firm to share the profits derived by that partner from the firm; and it is said by the learned author that this arrangement does not make the stranger a partner in the original firm but constitutes what is called a sub-partnership which in no way affects the other members of the principal firm. A case is cited in which a certain person agreed with one of the partners in a business that he should be interested in the business so far as to receive a share of the partner's profits of the business and also that he should have a right to draw his share from the firm. But it was nevertheless held that he was not a partner in that firm; that he had no demand against it; that he had no account in it; and that his rights were limited to a share out of the profits paid to his principal partner. At p. 553 it is stated that a sub-partner wishing to have an account of those profits to which he is entitled must bring his action against the principal alone and not make the other partners in the firm parties to the action. If it is not open to a sub-partner to sue for accounts, I do not see how it can be held that he is a partner of the firm. Moreover in 36 Bom L R 786 (2) there is a passage which implies that the decision of the High Court would have been different if the four persons who signed the contract of partnership as representatives of the firms of which they were members had signed for their own individual benefit, the firms themselves being only in the position of sub-partners sharing in the profits of the four individuals who signed the agreement of partnership; the firm would then have been taken to consist of four members only and not of the total number of partners comprising the four firms. This implies that in the view of their Lordships sub-partners are not members of a firm and the existence of a sub-partner would not affect the number of members of a firm for the purposes of S. 4, Companies Act. I hold that in this respect there is no objection to the suit.

It is then contended that the agreement in fact created an immediate demise of the property and operated as an actual transfer and therefore required writing and registration under S. 107, T. P. Act, and in the absence of writing and registration, cannot now be enforced. I agree that since the plaintiff firm actually took possession of the property upon the very

2. Pannaji v. Senaji, 1934 Bom 361=152 I C 580=36 Bom L R 786.

3. Senaji v. Panaji, 1930 P C 300=126 I C 429 =32 Bom L R 1607.

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day of the agreement and paid rent, it is difficult to say that the agreement did not amount to a lease within the definition of S. 105, T. P. Act, and to that extent is void. But the agreement was also an agreement for a lease and I do not know why, in so far as it is an agreement for a lease, it should be void merely because, regarded as a transfer of property: it is void. In 58 I A 91 (4) the facts were almost exactly the same, the only difference being that it was a suit in ejectment in which the defendant pleaded a right under an agreement of lease. It was held that as there was no lease by means of a registered document as required by S. 107, T. P. Act, the plaintiff was entitled to eject the defendant, but that had the defendant been within time (which on the facts of that case he was not), it would have been open to him to sue for specific performance of the verbal agreement for a lease and in the meantime to ask for the plaintiff's ejectment suit to be stayed. That was a case where under an oral agreement for a lease the defendant was put into immediate possession of the property, just as the plaintiff was put into immediate possession of the property here.

It is then contended that the agreement is indefinite. The evidence is unsatisfactory; but nevertheless both the Courts below have come to a definite conclusion as to the main terms of the agreement, namely that it was to be for an annual rent of Rs. 308-12-0 and for a term of fifty-one years. As regards the formal lease, it is held that no definite date was fixed. The plaintiff says in his evidence that the lease was to be given in a month or two; but I doubt if that statement can be taken literally, since the date of the lease must have depended upon the date when defendant 1 obtained his title to lease the land, and that would not be until the Thakore had first leased it to Naran and Naran leased it to defendant 1.

Nor do I see any objection to enforcing the agreement on the score of limitation. It could not be enforced until the defendant got his title, and it appears from the judgment of the learned Assistant Judge in appeal that the deed which the Thakore and Naran had to execute in favour of defendant 1 before defendant 1 could get his title was not executed until the year 1927. This suit has been brought in the year 1928 and is clearly in time. The last point however is serious for the plaintiff. Defendant 1 is a partner of the plaintiff firm and he is being sued by the plaintiff firm not as a formal defendant but as a contesting defendant, and he himself has contested the legality of the suit upon this ground. In 25 Bom 606 (5), reference was made to the rule that the same individual, even if he has two capacities, cannot be both a plaintiff and a defendant in the same action, and it was held that where an individual was a common partner in two houses of trade, no action could be brought by one firm against the other firm upon any transaction which was between them while such individual was a common partner. So far as it goes, this statement appears to be unequivocal. But their Lordships stated that the rule was subject to an exception in equity in certain cases where it might be possible to ascertain the rights and liabilities of a member of a firm when all the parties were before the Court; and they said that although the Courts of equity in England strictly observed the rule that a man cannot be both plaintiff and defendant, they did not allow it to stand in the way of their doing justice between the parties, and provided all interested persons were before the Court, either as plaintiffs or as defendants, they adjusted and determined their rights. In the case which was then being decided a question arose as to the right of one of the partners of a firm to recover money against the firm and the order that was made in the case provided not for recovery of the money but for a declaration that that member of the firm in the taking of the partnership accounts was entitled to credit of the sum in dispute.

This question does not seem to have been considered at all by the learned Assistant Judge before whom the present appeal was brought, and it may be that the matter was not raised in this Court; but it was raised in the trial Court, and the equitable principle referred to in 25 Bom L R 606 (5) was considered but

4. Ariff v. Jadunath Majumdar, 1931 P C 79=131 I C 762=58 I A 91=58 Cal 1235.

5. Rustomji v. Seth Purshotamdas, (1901) 25 Bom 606=3 Bom L R 227.

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I think misunderstood. I do not think that the learned Judges who decided 25 Bom L R 606 (5) would have extended the equitable principle to cover a case as the present, which cannot be adequately dealt with merely by a declaration of a right to a credit on the partnership accounts. It is contended on the other side that O. 30, R. 9, Civil P. C., contemplates suits between a member of a firm and the firm of which he is a member, and that if a suit of the present kind cannot be included among the suits dealt with in R. 9, then there is no remedy for the aggrieved party. R. 9 merely says that O. 30 (which deals with suits by or against corporations) shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common. But in his commentary upon R. 9, Sir Dinshah Mulla expressly states that neither this nor any of the rules of O. 30 alters the substantative law as it existed before, and therefore apparently, if one or more partners using the name of the firm under this rule were to bring a suit against another partner claiming money as due to the plaintiff in connection with the affairs of the firm, "the only relief which the plaintiff could obtain would be on account of the dealings and transactions of the partners." I do not think that it can be said that R. 9 gives the plaintiff firm a right to bring the present suit and that under the existing law they have any remedy at all. Reliance is placed upon a passage occurring at p. 339, Edn. 10 of "Lindley on Partnership," which is this:

> Again, there appears to be no reason why an action should not now be maintained for the recovery of a debt due from one partner to the firm; nor why, if two firms have a common partner, an action should not be maintained by one firm against the other.

And further on it is said that in all cases in which such actions will lie, the firm or firms may sue or be sued in their firm name. But the learned author was referring only to suits for money, and nothing is said as to the form of the decree that would issue in such a case; and it may well be that the Courts in the circumstances of each particular case would fall back upon their power to declare the plaintiff or the defendant entitled to a credit in the accounts of the firm. In my opinion the suit is bad on this ground, and I therefore allow the appeal and direct that the suit be dismissed.

In the circumstances I direct that each party bear its own costs throughout.

V.B./R.K. *Appeal allowed.*

A. I. R. 1936 Bombay 250

B. J. WADIA, J.

Abdul Gani Sumar—Petitioner.

v.

Reception Committee of the 48th Indian National Congress—Opposite Party.

Awards Nos. 21 and 22 of 1935, Decided on 22nd July 1935.

(a) Civil P. C. (1908), O. 1, R. 8, Provisions of O. 1, R. 8, apply to petitions which can be heard and tried as suit—Petition to set aside award under S. 14, Arbitration Act is such petition—O. 1, R. 8 applies to it.

The provisions of O. 1, R. 8 apply to a petition for setting aside an award under S. 14, Arbitration Act. O. 1, R. 8 is only a rule of procedure made for the purposes of convenience and saving of trouble and expense, and a petitioner in making a petition is entitled to make use of it for these purposes if the respondents are numerous and in the same interest and the petition is one which can be heard and tried as a suit. It is for the Court whilst granting the permission under O. 1, R. 8 to consider whether the particular petition or application can be tried as an ordinary suit. A petition for setting aside an award under S. 14, Arbitration Act, is a such petition and therefore O. 1, R. 8 applies to it: *Case law discussed.* [P 255 C 2]

(b) Words and Phrases—Suit—Meaning of —Strictly speaking, proceeding which does not commence in plaint is not suit—Petition is not suit strictly so called.

A petition is not a suit strictly so called. Strictly speaking a proceeding which does not commence with plaint and which is not to be treated as a suit under any other Act of the legislature is not a suit and a decision given therein is not a decree: *Case law discussed.* [P 254 C 2]

(c) Practice — Inherent powers — Courts cannot override express provisions of law.

In India, where every Court is a Court of law as well as of equity, the Court has inherent powers to act according to justice, equity and good conscience, with the limitation that though these powers are wide and undefinable the Court cannot use them to override the express provisions of law: 5 *All* 163, *Foll.* [P 255 C 2]

(d) Arbitration Act (1899), S. 14—Whether suit lies to set aside award on grounds covered by S. 14—*Quaere*—Such suit is civil suit in terms of S. 9, Civil P. C.—Its cognizance is not expressly or impliedly barred—*Obiter*.

Quaere.—Whether a suit lies to set aside an award on the grounds covered by S. 14, Arbitration Act. [P 255 C 2]

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Obiter.—A suit to set aside an award even on the grounds covered by S. 14, Arbitration Act, is a civil suit in terms of S. 9, Civil P. C., and it cannot be said that its cognizance is expressly or impliedly barred. There is nothing in the Arbitration Act, which prohibits the filing of a suit, nor is there any other authority, which precludes the Court from entertaining a suit to set aside an award on the ground of misconduct or irregularity: *Case law discussed.* [P 252 C 2, P 253 C 1]

N. P. Engineer—for Petitioner.
M. C. Setalvad—for Opposite Party.

Order.— This is an application by the petitioner in the matter of award No. 21 of 1935 to amend the title of his petition filed on 3rd May 1935, and for leave under O. 1, R. 8, Civil P. C. The petition was filed to set aside the award dated 2nd February 1935, under the Indian Arbitration Act of 1899 on a submission dated 17th December 1934, to which the petitioner and the Reception Committee of the 48th Indian National Congress were parties. The petition was originally filed against (1) the Reception Committee, and (2) against Abidally Jafferbhai described as the General Secretary of the Reception Committee. On the hearing of the petition in chambers counsel for the respondents raised an objection to the title of the petition on the ground that the Reception Committee was not a registered society and could not be sued as such, and the petition was adjourned for three weeks in order to enable the petitioner to make such amendments as he might be advised to make. The petitioner now applies that the title of the petition should be amended, and that the Reception Committee should be proceeded against through its chairman and general secretary as representing themselves and all other members of the committee, as the members are numerous and have the same interest, and to make consequential amendments in the petition and the proceedings. He also prays for leave under O. 1, R. 8, to file the petition and proceed with the same against the chairman and the general secretary as representing themselves and all other members of the committee, and for an order directing the Prothonotary and Senior Master of the Court to give notice of the filing of the petition by advertisement in the local newspapers. There is also a similar application in the matter of award No. 22 of 1935.

It was argued on behalf of the respondents that the leave could not be granted, as O. 1, R. 8, was applicable to suits, and here there was only a petition. The rule provides that where there are numerous persons having the same interest in one 'suit,' one or more of such persons may with the permission of the Court sue or defend on behalf of all who are in the same interest. The corresponding words of O. 16, R. 9, of the Rules of the Supreme Court, are "one cause or matter," and it is provided that where there are numerous persons having the same interest in such cause or matter, one or more of them may sue or be sued on behalf of the others. The words 'cause' or 'matter' are, if at all, a little wider than the word 'suit' in O. 1, R. 8. Under S. 225 of the Supreme Court of Judicature (Consolidation) Act of 1925 'cause' includes an action, suit or other original proceeding between a plaintiff and a defendant, and 'matter' includes every proceeding in the Court not in a cause. It was however stated that although the rule of the Supreme Court of England applied to a cause or matter, in practice it was only applied to suits which are known as representative suits, and that there was no precedent of a representative petition or application. Counsel accordingly contended that the only remedy for the petitioner was to file a suit before he could take advantage of the provisions of O. 1, R. 8, of the Code.

On the other hand, counsel for the petitioner argued that it was not competent for him to file a suit when he was applying under S. 14 Arbitration Act, to set aside an award on the ground that the arbitrator had misconducted himself or where an arbitration or award had been improperly procured. In such cases the Court has jurisdiction to set aside the award, but it was contended that the procedure was by way of petition under R. 373 of the High Court Rules which provides that all appplications under the Indian Arbitration Act other than under S. 19 shall be made by petition. The rule is one of the rules made under S. 20 of the Act which provides that the High Court may make rules consistent with the Act, amongst other things, as to the filing of awards and all proceedings consequent thereon or incidental thereto. It was also argued that R. 373 was imperative, and that there was no other procedure open to the petitioner. It is con-

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ceded that there is no provision in the Act which bars the filing of a suit to set aside an award. All that S. 14 provides is that on the grounds mentioned in it or either of them the Court may set aside the award, and R. 373 lays down a summary remedy in order that the petition and the answer thereto may be speedily disposed of. The only question is whether that remedy takes away the remedy by suit. The point arose in 24 C W N 454 (1). In that case plaintiff filed a suit for a declaration that a contract for the sale of piece-goods alleged to have been entered into between him and the defendants was invalid, as the parties were not ad idem on a fundamental point, and that the award made in favour of the defendants for breach of the contract was void and inoperative. The plaintiff also charged the defendants with fraud, as it was alleged that the defendants claimed damages for refusal to accept goods which they never offered and were not in a position to deliver. It was held that there was nothing in the Act which barred the suit. It was said that this was unquestionably a suit of a civil nature, and the Court had not been able to discover how its cognizance was expressly or impliedly barred under the terms of S. 9, Civil P. C. At p. 459 Mookerjee, observes as follows:

> Section 14 empowers the Court to set aside an award where an arbitrator or umpire has misconducted himself or an arbitration award has been improperly procured. Assume for a moment that this authority of the Court may be invoked by way of an application; still the question may arise, whether such remedy is exclusive, or, whether the party affected may not, at his choice, have recourse to a suit as the more preferable course. We need not decide that question, because in the case before us, the grievance alleged is deeper and broader than what is contemplated by S. 14.

The question, therefore, whether an application by way of petition was the exclusive and not merely an alternate remedy, where the grounds of attack were completely covered by S. 14, Arbitration Act, was left open. In that case the buyer disputed the very existence of the contract, and contended that the claim of the sellers to recover damages was tainted with fraud. This according to the learned Judges was plainly a matter for investigation in a suit, though Rankin, J., in the Court below, had held that under the Indian Arbitration Act all applications to set aside an award which had been filed should be made by petition, whatever may be the ground. It was, however held by the late Mirza, J., in *Tarachand Raghavji* v. *Dawlatram Mohandas* (2), following 50 Cal 1 (3), that an objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought to be taken by motion to set aside the award, but that where it was alleged that the arbitrator had acted wholly without jurisdiction, the award could be questioned in a suit brought for that purpose. In my opinion, however, a suit to set aside an award even on the grounds covered by S. 14 is a civil suit in terms of S. 9 of the Code, and it cannot be said that its cognizance is either expressly or impliedly barred. A suit is expressly barred by an enactment for the time being in force. It is impliedly barred when it is barred by general principles of the law. It cannot be said that the suit would be barred by reason merely of a rule made under S. 20. Such a rule must be consistent with the Act. The rule provides that the remedy to set aside an award shall be by petition, but there is nothing in the Act to indicate that the remedy by a suit is in any way inconsistent with it. It has been held that a suit for a declaration that an award is not binding on the plaintiff is maintainable under S. 42, Specific Relief Act.

It has also been held under Art. 91, Limitation Act, that an award is an instrument within the meaning of the article, and a suit can be brought to set aside the award within the period prescribed by it. Moreover, the provisions of the Indian Arbitration Act are based on the English Arbitration Act of 1889. The terms of S. 11 of the English Act are similar to the terms of S. 14. There is, however, no provision which prevents an award being set aside in England by an action. I can see no reason why in India an award cannot be set aside, on the grounds mentioned in S. 14, by means of a regular suit, but the point is not altogether free from doubt. I may also in this connexion refer to S. 39, Specific

1. Radha Kissen v. Lukhmi Chand, 1920 Cal 150=56 I C 541=24 C W N 454=31 C L J 283.
2. (1932) Arbitration No 49 of 1932, decided by Mirza J., on November 25, 1932 (Unrep).
3. Sassoon & Co. v. Ramdutt Ramkissen Das, 1922 P C 374=70 I C 777 = 49 I A 366=50 Cal 1 (P C).

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Relief Act. If according to its terms the petitioner entertains a reasonable apprehension that the award if left outstanding may cause him serious injury, and he contends that the award, which is a written instrument, is either void or voidable and should be set aside, he may bring a suit to have it so adjudged. In such a case it is open to the Court not to allow the petitioner to proceed by suit, as a remedy specially designed for the speedy determination of a dispute relating to the conduct of arbitrators is open to him. But there is nothing in the Indian Arbitration Act which prohibits the filing of a suit, nor is there any other authority which precludes the Court from entertaining a suit to set aside an award on the ground of misconduct or irregularity. It was held in 3 Lah 296 (4) that there is no cogent reason why the question of misconduct of arbitrators should be excluded from the scope of a regular action to set aside the award. It has also been held that where an award is challenged on the ground that there was no submission to arbitration by the parties, the remedy is by filing a regular suit and not by an application under S. 14 of the Indian Arbitration Act: see 47 Cal 806 (5).

Before driving the petitioner, however, to file a suit in order that he may take the benefit of O. 1, R. 8, of the Code, I have still to consider whether he cannot avail himself of that rule even on a petition. The word 'suit' has not been defined in the Civil Procedure Code, nor in the General Clauses Act. In Wharton's Law Lexicon it is stated that the word 'suit' is used in diverse senses, and the first is:

An action in the Supreme Court, or a proceeding by petition in the divorce branch of that Court; a prosecution: a petition to a Court, etc., see Jud. Act, 1873, S. 100, now S. 225 of the Jud. Act of 1925. Under S. 225 of the Act of 1925, 'suit' includes 'action,' and 'action' means a civil proceeding commenced by a writ or in such other manner as may be prescribed by Rules of Court. The word 'cause' includes under the Judicature Act any action, suit or other original proceeding between a plaintiff and a defendant, as I have stated before.

A suit is, therefore, an original proceeding between a plaintiff and a defendant. Plaintiff is defined as including

every person asking any relief against any other person by any form of proceeding, whether the same be taken by cause, action, suit, petition, motion, summons or otherwise;

and "defendant" includes

every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings.

Accordingly it was held in 23 Ir 7 (6) that these definitions were wide enough to cover a petition served on anyone, and that a petition would come within the meaning of the word 'suit.' But it must be said that it is only by virtue of the interpretation clause in the Judicature Act that the term 'suit' includes a petition. It was pointed out in 39 All 626 (7), (p. 632) that:

There is no definition of the word 'suit,' probably because it is not possible to frame one which will satisfactorily survive every test. But on the other hand it is not difficult to decide in the vast majority of cases whether a proceeding is in fact a suit or whether it is merely a summary or subsidiary application.

On the other hand, Peacock, C. J., observed in a Full Bench decision in 9 W R 402 (8) as follows (p. 406):

The word 'suit' does not necessarily mean an action, nor do the words 'cause of action,' and 'defendant' necessarily mean cause upon which an action has been brought, or a person against whom an action has been brought, in the ordinary restricted sense of the words. Any proceeding in a Court of justice to enforce a demand is a suit; the person who applies to the Court is a suitor for relief; the person who defends himself against the enforcement of the relief sought is a defendant; and the claim, if recoverable, is a cause of action.

It is laid down in S. 2, Limitation Act, that a suit does not include an appeal or an application, but this distinction seems to be confined in its effect to the immediate purposes of that Act. Suits, appeals and applications are, therefore, treated in three distinct divisions in the Schedule 1 of the Act. There is also the case of 5 Cal 897 (9), in which the appeal Court in construing the words in S. 2, Limitation Act of 1877, namely "nothing herein shall be deemed to revive any right to sue" held that the words "right to sue" should be used in their

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4. Jai Narain-Babu Lal v. Narain Das-Jaini Mal, 1922 Lah 369=69 I C 583=3 Lah 296.
5. Matulal Dalmia v. Ramkissen Das Madan Gopal, 1920 Cal 820=69 I C 568=47 Cal 806.
6. In re Wallis' Trusts, (1888) 23 Ir 7.
7. Pita Ram v. Jujihar Singh, 1918 All 346=43 I C 573=39 All 626.
8. Hurro Chunder Roy Chowdhry v. Shoorodhonee Debia, (1868) 9 W R 402=B L R Sup Vol 985.
9. Nursing Doyal v. Hurryhur Saha, (1880) 5 Cal 897=6 C L R 489.

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widest signification, and would include any application invoking the aid of the Court for the purpose of satisfying a demand. It may be here mentioned that even in the Act of 1877 the term 'suit' is defined as not including an appeal or an application. According to the Privy Council, however, 'suit' ordinarily means, and, apart from any particular context, may be taken to mean a civil proceeding instituted by the presentation of a plaint: see 60 I A 13 (10). It is also provided by S. 26, Civil P. C., read with O. 4, R. 1, that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. The words "in such other manner as may be prescribed" are new, but no other manner of instituting suits has hitherto been prescribed. It is arguable whether the word 'suit' also includes a proceeding which according to the specific provisions of the law contained in any Act or Statute should be regarded as a suit under the Code.

Sir Dinshah Mulla in his Commentary on the Code, 10th edn., at p. 7, says that every suit is commenced by a plaint, and when there is no civil suit there is no decree. But, he adds, some proceedings commenced by an application are statutory suits, so that the decision is a decree, e. g., a contentious probate proceeding, or an application to file an agreement to refer to arbitration. In such and other cases proceedings are commenced by petitions, and not by plaints, by reason of the enactments relating to the special subjects. They are treated as suits. According to the decision in 22 Mad 256 (11) there is authority for the view that the term 'suit' has not a narrow significance, but is a very comprehensive one, and that it applies to all contentious proceedings in a civil Court in which the rights of parties are in question and in which the Court is asked to determine them. According to 22 Cal 943 (12) it is applicable to such proceedings as under that description are directly dealt with by the Code, and such as by the operation of the particular Acts which regulate them are treated as suits. Strictly speaking therefore it may be said that a proceeding which does not commence with a plaint, and which is not to be treated as a suit under any other Act of the Legislature, is not a suit, and a decision given therein is not a decree.

Counsel referred to Sch. 2 to the Code, para. 20 (2), which provides that an application by a person interested in an award, made in a matter referred to arbitration without the intervention of a Court, for filing the same shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. It was held by the appeal Court in 45 Bom 329 (13) that the proceedings under paras. 20 and 21, Sch. 2 were not proceedings in a suit, though for the purposes of convenience they may be numbered and registered as a suit. That was a decision for the purpose of S. 11, Civil P. C., and it was held that an order refusing to file an award was not res judicata in a later regular suit on the ground that the earlier proceedings were not a suit. In a later decision of the appeal Court in 29 Bom L R 342 (14) it was however held that the application when numbered and registered as a suit becomes a suit for the purposes of O. 38 of the Code, and that the Court had jurisdiction to direct an attachment before judgment. There is a still later decision of the appeal Court in 35 Bom L R 1101 (15), in which the appeal Court held that when an application for filing an award is made, it becomes a suit. It was also held that as O. 1, R. 8, applies to suits, a notice can issue under O. 1, R. 8, and that it was a mere surplusage to issue two separate notices, one under O. 1, R. 8, and the other under para. 20 (3), Sch. 2; but the question whether the provision of O. 1, R. 8, can or cannot be made use of in an application for filing an award, and also for setting an award aside, was not clearly decided in that suit. There is thus a conflict of opinion as to whether proceedings under paras. 20 and 21, Sch. 2 to the Code can be said to be proceedings in a suit. The present

10. Hansraj Gupta v. Official Liquidators, Dehra Dun-Mussoorie E. T. Co., 1933 P C 63=142 I C 7=60 I A 13=54 All 1067 (P C).
11. Venkata Chandrappa Nayanivaru v. Venkata Rama Reddi, (1898) 22 Mad 256.
12. Watkins v. Fox, (1895) 22 Cal 943.
13. Rajmal Girdharlal v. Maruti Shivram, 1921 Bom 389=59 I C 755=45 Bom 329.
14. Govind v. Venkatesh, 1927 Bom 259 = 101 I C 430=29 Bom L R 342.
15. Parshottamdas v. Kekhushru, 1934 Bom 6 =149 I C 324=35 Bom L R 1101.

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petition however is not under the Code, but under S. 14, Arbitration Act.

It is true that there is no provision in the Act corresponding to para. 20, Sch. 2, for under the Act it is the arbitrator who at the request of a party to the submission files the award in Court, and there is no provision for any application by a person interested in the award for filing it in Court. It cannot therefore be said that a petition is a suit, strictly so called, but the question still remains whether it is a proceeding in the nature of a suit or analogous to a suit so as to attract to it the benefit of the provisions of O. 1, R. 8. Under S. 141, Civil P. C., the procedure provided in it in regard to suits is to be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. The proceedings referred to are original matters in the nature of suits. The section does not however refer to execution proceedings. It must be remembered that O. 1, R. 8, is a rule of procedure, and is an exception to the general rule that all persons interested in a suit are to be made parties thereto. As is pointed out by Sir Dinshah Mulla, convenience requires that in suits where there is a community of interest amongst a large number of persons a few should be allowed to represent the rest, so that trouble and expense may be saved.

Why should not, for the sake of the same convenience and the saving of trouble and expense, a few persons be allowed to sue or be sued in the matter of a petition where there is a community of interest amongst a much larger number? The Court has inherent powers under S. 151 of the Code to make such orders as may be necessary for the ends of justice. There will always be cases and circumstances, which are not covered by the express provisions of the Code, where justice has to be done, and it cannot be said that the Courts have no power to do justice or redress a wrong, merely because no express provision of the Code or a reported decision of a Court is to be found on all fours to meet the requirements of a case. The Code is not exhaustive. As was pointed out by Mahmood, J., in 5 All 163 (16):

> Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibitions cannot be presumed. (p. 172).

In India, where every Court is a Court of law as well as of equity, the Court has inherent powers to act according to justice, equity and good conscience, with this limitation that though these powers are wide and indefinable, the Court cannot use them to override the express provisions of the law. I have already stated that it is doubtful whether a suit lies to set aside an award on the grounds covered by S. 14, Arbitration Act. If then the provisions of O. 1, R. 8, are applicable strictly to suits commenced by filing plaints, it will follow that a petitioner who wishes to proceed against numerous persons in the same interest in order to set aside an award on the ground of the arbitrator's misconduct cannot file a suit in which he can get the benefit of the provisions of O. 1, R. 8, and being restricted to a petition as the only form of procedure, cannot be allowed to use those provisions, because he is told that a petition is not a suit. After all, O. 1, R. 8, is only a rule of procedure made for the purposes of convenience and saving of trouble and expense, and I see no reason why a petitioner should be prevented from making use of it for the sake of the same convenience and for saving trouble and expense, if the respondents are numerous and in the same interest, and the petition is one which can be heard and tried as a suit. It is for the Court whilst granting the permission under O. 1, R. 8, to consider whether the particular petition or application can be tried as an ordinary suit. A petition for setting aside an award under S. 14, Arbitration Act, is such a petition. It was conceded that the number of members of the Reception Committee to be used was very large. Such petitions are often adjourned into Court; and evidence is allowed to be tendered, both oral as well as documentary, just as in the trial of a suit, before the Court pronounces its judgment. Moreover, there is no specific prohibition in the rule against its being used in connexion with petitions or applications which are analogous to or are in the nature of suits, and tried as such; and under S. 151 which saves the inherent powers of the Court to do com-

16. Narsingh Das v. Mangal Dubey, (1882) 5 All 163=1882 A.W N 202.

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plete and substantial justice, I am inclined, even if I am thereby creating a precedent, to allow the amendment and to give the leave asked for. in both petitions. The petitioners will make the amendments in their petitions respectively at their own cost, and notice of the petition in each case will also be given by public advertisement at the petitioner's expense. Costs of these applications in chambers will be costs in the respective petitions. Counsel certified.

R.M./R.K. *Order accordingly.*

A. I. R. 1936 Bombay 256

BARLEE AND DIVATIA, JJ.

Bhana Makan—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 369 of 1935, Decided on 14th January 1936, from decision of Hon. Presidency Magistrates' Court, Bombay.

(a) Bombay City Police Act (4 of 1902), S. 22 (b) and (c) and Rules — Parking car in street—Offence falls under S. 22 (c), R. 1.

When the offence does not consist in the accused driving the car in any part of the public street and obstructing the traffic by such driving, but consists in keeping the car standing in a street and thereby obstructing the traffic, the case falls under S. 22, Cl. (c) and rules framed thereunder rather than under any rule under S. 22, Cl. (b); and the proper rule applicable to such a case is R. 1 framed under S. 22 (c) and not R. 12 framed under S. 22 (b). [P 257 C 1]

(b) Bombay City Police Act (4 of 1902), Ss. 22 (b) and 22 (c) and Rules — S. 22 (c), R. 1 and S. 22 (b), R. 12, distinction between explained.

Section 22 (c) speaks about regulating conditions under which vehicles may remain standing in streets and R. 1 clearly speaks of a person allowing his vehicle to be halted or kept standing at any street. R. 12 framed under S. 22 (b) is quite general and speaks of any person occupying a portion of a street and thereby causing obstruction or inconvenience to the public. The obstruction under R 1 framed under S. 22 (c) must be wilful, which is not the case under R. 12 framed under S. 22 (b) and there can be no conviction under the former rule unless that element is proved. [P 257 C 1]

(c) Interpretation of Statutes — Specific provision and general provision — Specific provision must govern case.

Where there is a specific provision in a statute as well as a general one, and the case is covered by the specific provision, it is the specific provision, which must govern the case and not the general. [P 257 C 1]

S. D. Vimadalal—for Applicant.

B. G. Rao—for the Crown.

Divatia, J.—The petitioner in this case has been convicted and sentenced to a fine of Rs. 5 under R. 12 framed under S. 22 (b), Bombay City Police Act. That section empowers the Commissioner of Police to make rules, among others, for regulating traffic of all kinds in streets and public places, and the use of streets and public places by persons riding, driving, cycling, walking or leading or accompanying cattle, so as to prevent danger, obstruction or inconvenience to the public, and R. 12 framed under this section runs thus:

> No person shall occupy any portion of any street so as to cause obstruction to traffic or inconvenience to the public.

The facts shortly are that, according to the prosecution case, the petitioner, who is a chauffeur, had kept his car near the kerb on the Kalbadevi Road at some point between the Princess Street and Dhobi Talao, and that he had thereby caused obstruction to the traffic by occupying a portion of the public street. The learned Honorary Magistrates, who tried the case, were of the opinion that the offence was proved inasmuch as the accused caused such obstruction. The accused's statement was that he had stopped his car near his master's shop and that he was waiting for his master. There are no notes of evidence before us and the judgment is very short. It simply states that on the evidence before it the Court convicted the accused and fined him. It could be gathered from this that the Magistrates were satisfied that the accused caused obstruction to the traffic by occupying a portion of the public street. If this rule was applicable, and if the Magistrate were satisfied that such obstruction was caused, this Court would be slow to interfere with that finding in revision. But, in our opinion, R. 12 does not apply to this case. S. 22 (c) empowers the Commissioner of Police to make rules regulating the conditions under which vehicles may remain standing in streets and public places, and the use of streets as halting places for vehicles or cattle and R. 1 framed under this part of S. 22 says:

> No person shall wilfully cause any vehicle or cattle to be halted or remain standing in any street or public place so as to cause danger, obstruction or inconvenience to any of the public.

Now, it is common ground in this case that the offence did not consist in

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the accused driving the car in any part of the public street and obstructing the traffic by such driving, but it occurred in his keeping the car standing near the kerb and thereby obstructing the traffic. That being the case, in our opinion, the case would fall under the specific words of S. 22, Cl. (c), and the rules framed thereunder rather than under any rule under S. 22(b) of the Act. S. 22 (c) speaks about regulating conditions under which vehicles may remain standing in streets, and R. 1 clearly speaks of a person allowing his vehicle to be halted or kept standing at any street. R. 12 framed under S. 22 (b) is quite general and speaks of any person occupying a portion of a street and thereby causing obstruction or inconvenience to the public. Besides, the obstruction under R. 1 framed under S. 22 (c) must be wilful, which is not the case under R. 12 framed under S. 22 (b) and there can be no conviction under the former rule unless that element is proved.

It is a well recognized canon of construction that where there is a specific provision in a statute as well as a general one, and the case is covered by the specific provision, it is that specific provision which must govern the case and not the general one, and here it is clear that the prosecution case comes under the specific R. 1 under S. 22, Cl. (c). We think therefore that the rule under which the petitioner has been convicted does not apply to this case. That being so, the conviction of the accused is wrong in law. The rule is made absolute, the conviction is set aside, and the fine, if paid, should be refunded.

V.B./R.K. *Conviction set aside.*

A. I. R. 1936 Bombay 257

CHITRE, J.

Fidahusein Pirmahomedalli—Plaintiff.

v.

Bai Monghibai—Defendant.

O. C. J. Suit No. 1421 of 1933, Decided on 11th October 1935.

Mahomedan Law—Will—Khoja of Shiah Ishna Ashari sect can dispose of whole property by will.

A Khoja of the Shiah Ishna Ashari sect can dispose of the whole of his property by a testamentary disposition: *Case law discussed and summary of origin of Khoja sect given.*

[P 264 C 2]

R. S. Billimoria—for Plaintiff.

K. M. Munshi—for Defendant.

1936 B/33 & 34

Judgment. — The simple issue I am asked to try in this case is whether a Khoja of the Shiah Ishna Ashari sect can dispose of the whole of his property by a testamentary disposition. Since 1847, when the well-known case of *Kojahs and Memons'* (1) was decided, the law applicable to a dead Khoja has been agitated and a series of cases have laid down beyond doubt that in matters of simple succession and inheritance the Hindu law applies. Two of them are appeal Court judgments, and yet, a single Judge in recent times threw a doubt (in itself an obiter) on the ground that only such part of the Hindu law of succession and inheritance can be said to apply as is proved to have been adopted by the Khojas. His reasoning is that ordinarily the Hindu law governs the Hindus and the Mahomedan law governs the Mahomedans. Unless, therefore, any portion of the Hindu law is proved to have been adopted by the Khojas as their personal law, the ordinary presumption should prevail. The learned Judge after a lengthy examination of the case law came to the conclusion that it has not been established by evidence that the Khojas have adopted by custom the right to will away the whole of the property and he expressed an opinion that he would confine the application of Hindu law to intestate succession. The learned Judge had the limitation present to his mind that a Hindu can only will away his self-acquired property. But that is confounding the Hindu law of joint family property with rights of succession and inheritance. It has been held beyond doubt that the Hindu law of joint family property does not apply to Khojas.

The famous dictum of Russell, J., that a Khoja is a living Mahomedan and a dead Hindu is a paradoxical truism. A Khoja can, therefore, dispose of the whole of his property during his lifetime. The elements of ancestral or joint family property do not exist. His sons take no interest by birth. They cannot demand partition and the property in the hands of a Khoja during his lifetime is his absolute property. If the sons have no vested interest in the property during the lifetime of a Khoja father he must be taken to have died with all the property as his own. To hold otherwise would be

1. (1847) Perry O C 110.

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to raise absurd questions as to heirship, and joint and self-acquired property. Either the property vests in the sons or it does not. There cannot be a vacuum and the sons' rights cannot spring into existence all at once on the father's death. A Khoja, as any living Mahomedan, can make a will exceeding one-third of the property with the consent of the heirs, but such consent must be given after the testator's death. If you bring in the principle of joint family property the question would arise: "Consent of which heirs? Under the Mahomedan law or the Hindu law?" The heirs under the two systems differ. Harmony can only be established if you eliminate the Hindu law of joint family property and apply the Hindu law of simple succession and inheritance. It is well established by authorities that the law of wills is a part of the law of succession and inheritance. Succession is either testamentary or intestate. To say that on the death of a Khoja only the Hindu law of "intestate succession" applies is to make an encroachment on the established rule of law that the Hindu law of joint family property does not apply to Khojas. It is not a correct statement of law to say that only such part of the Hindu law of succession and inheritance applies as is proved to have been adopted by the Khojas by custom.

The conversion of Hindus of Sind by the ancestors of H. H. the Aga Khan was a mass conversion and while accepting a new faith they retained their old system of devolution of property. You adopt what you have not got. You retain what you already possess. The correct proposition, therefore, is that whoever wants to establish that a custom derogatory to the Hindu law of succession and inheritance is adopted must prove it. No such custom derogatory to the Hindu law of simple succession and inheritance has been ever alleged or proved. The fact that it has not been alleged or proved ever since 1847 in any case involving a will, shows that it did not admit of proof and the further fact that the point was conceded in all cases of wills, though it would be to the manifest advantage of the party interested to raise the point strengthens the view that no such exception existed and the point was treated as concluded. With this preliminary rapid survey of the legal position I shall now give a short summary of the origin of Khoja sect which will be a help to appreciate the principles of the Hindu law of succession and inheritance made applicable to them.

The report of the *Aga Khan's case*, 12 B H C R 323*n* (2), in which judgment was delivered by Arnould, J., in 1866, is given in a note at foot of p. 323 of 12 B H C R. The issues are mentioned at p. 329 and issue 2 is, "Who and what are the Shiah Imami Ismailis," and issue 4 is, "Who and what are Khojas." Arnould, J., after careful consideration of the voluminous evidence led in the case, came to the conclusion that the Khojas were originally Hindus of trading class inhabiting the towns and villages of Upper Sind. The position and circumstances of those remote and isolated traders were manifestly such as to favour a conversion of some form or other of Mahomedanism. They were converted by Pir Sadra Din about four hundred years ago, and according to tradition of the great body of the Khoja community Pir Sadra Din came from Khorasan and was an Ismail Dai or missionary sent by Shah Islam, one of the ancestors of H. H the Aga Khan. The form of Mahomedanism which he taught his converts was Shiah Imami Ismaili faith. Arnould, J. further points out that as a rule Khojas have no mosque or masjid. As a matter of fact the only Khoja mosque in existence was that erected in 1822 in the Khoja burial ground in Bombay, where funeral rites to the dead are performed before burial. The Jamatkhana is their prayer-house, where they recite gnan (knowledge), which is a free composition in verse of some parts of Koran and Hindu Mythology. Even in this composition there is no mention of the Mahomedan law of succession and inheritance. Their accepted scripture is "Dashavatar." At p 359, Arnould, J. gives a short summary of the scripture of Dashavatar. He says:

It is a treatise in 10 chapters containing (as indeed, its name imports) the account of ten avatars or incarnations, each dealt with *in a separate chapter. The first 9 of these chapters treat of the nine incarnations of the Hindu God Vishnu; the 10th chapter treats of the incarnation of the "Most Holy Ali"* (Nine-tenths of their scripture is thus based on the Hindu divinity of Vishnu) . . . . the idolatry of the

2. The Advocate-General ex relatione Daya Muhammad v. Muhammad Husen Huseni, (1866) 12 B H C R 323*n*.

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first 9 chapters, the semi-deification of Ali implied in the 10th chapter, alike are utterly impossible.

The "avatar" is manifestation of God on earth in human form to relieve dire distress. Vishnu is the centre of Hindu conception of Trinity which consists of Brahma, Vishnu and Mahesh. The first is the Creator, second Protector, and the third Destroyer. As observed in 11 Bom L R 409 (3), only a clever and astute brain could have compiled such a scripture for the acceptance of Hindu traders in North Sind. It will be clear from this short account that the conversion of Khojas to the Shiah Imami Ismaili sect was not a case of individual conversions but was a mass or a community conversion; call it mass hypnotism if you choose. In a case like this no rigid rule of logic can govern a convert society like the Khojas. The rigid rule of law laid down in 10 M I A 511 (4) and 57 I A 313 (5), applies to individual conversions. In the former case it was held that Mahomedan law applies not only to persons who are Mahomedans by birth, but by religion also In the latter case it was held that a convert changed not only his religion, but his personal law also. These rigid logical rules may apply to individual conversions, but in the case of a community conversion the converts may retain a portion of their personal law according to their social habits and surroundings. They retain their personal law unless they consciously adopt another. In 9 M I A 195 (6), their Lordships of the Privy Council observed (pp. 238 and 239):

> He (a Hindu convert to Christianity) may renounce the old law (his own personal law) by which he was bound, as he has renounced his old religion, or, if he thinks fit, he may abide by the old law, (in the absence of any statutory provision) notwithstanding he has renounced his old religion . . . . The profession of Christianity releases the convert from the trammels of the Hindu law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interest in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindu law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class which . . . . has adopted and acted upon some particular law, or by having himself observed some family usage or custom; . . . .

This case illustrates the distinction between parcenership and heirship. Parcenership must be governed by the law to which a person has become a convert; heirship may be governed by his old personal law. A Hindu convert cannot possibly remain a member of Hindu coparcenary, but the succession to his property may be governed by Hindu law. The only exception to this rule is when the succession is governed by statute, e. g., a Hindu convert to Christianity now cannot, as laid down in 48 I A 381 (7), elect to be bound by the Hindu law as opposed to the statutory provision under the Indian Succession Act. To my mind the true principle is laid down in 43 I A 35 (8), known as the Mombasa case. That was a case of a Memon, another sect of Mahomedans who were converted from Hindu religion some four centuries ago, but retained their Hindu law of succession and throughout India were governed by that law save where a local custom to the contrary was proved In fact, Memons are more orthodox converts than Khojas. In that case a Memon, whose father some fifty years before the suit, had migrated from India and settled with his family among Mahomedans at Mombasa, lived at that place and died there intestate. It was held upon evidence of practice among Memons at Mombasa that the succession to the estate of the deceased Memon was governed by Mahomedan law and not by Hindu law. Viscount Haldane in delivering judgment observed as follows (p. 41):

> Where a Hindu family migrates from one part of India to another, prima facie they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrates to another country, and, being themselves Mahomedans, settle among Mahomedans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments. The analogy is that of a change of domicile on settl-

3. Haji Bibi v. The Aga Khan, (1909) 11 Bom L R 409=2 I C 874.
4. Jowala Buksh v. Dharum Singh, (1866) 10 M I A 511=2 Sar 189 (P C).
5. Mitar Sen Singh v. Maqbul Hasan Khan, 1930 P C 251=128 I C 268=57 I A 313 (P C).
6. Abraham v. Abraham, (1863) 9 M I A 195=1 W R 1=2 Suth 501=2 Sar 10 (P C).
7. Kamawati v Digbijai Singh, 1922 P C 14=64 I C 559=48 I A 381=43 All 525 (P C).
8. Abudurahim Haji Ismail Mithu v. Halimabai, 1915 P C 86=32 I C 413=43 I A 35 (P C).

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ing in a new country rather than the analogy of a change of custom on migration within India. The question is simply one of the proper inference to be drawn from the circumstances.

The same principle is observed in 43 Bom 647 (9), which is confirmed in appeal to the Privy Council, where it was held that Halai Memons of Porbander in Kathiawar follow in matters of succession and inheritance the Hindu law and not Mahomedan law, differing in that respect from the Halai Memons of Bombay, and consequently upon the death intestate in Bombay of a Halai Memon of Porbander who had carried on business for many years in Bombay but was found to be domiciled in Porbander, his only son took the whole estate to the exclusion of a daughter. The principle I deduce from the short history of the Khojas of Shiah Imami Ismaili sect and the case-law cited above is that a Hindu convert residing in India is governed by his personal law unless he renounces the old law and accepts the new one except where a statutory provision is made. His intention to renounce the old law is to be inferred (a) if he attaches himself to a class which follows a particular law, or (b) if he observes some family usage or custom derogatory to the old law, and this principle to my mind applies with greater force to a case of mass conversion like the Khojas. Having given a short history of the Khoja sect and the principles of the law applicable to them, I shall now proceed to examine the case-law cited to me on the question at issue, viz., whether a Khoja can dispose of the whole of his property by a testamentary disposition. I do not wish to examine in great detail each and every authority cited to me. That has been done more than once by eminent Judges. I shall try to deduce from the case-law cited to me the principle that governs the point at issue.

A series of decisions were cited from (1847) Perry O C 110 (1) to 1935, which with one exception lay down the proposition that in matters of succession and inheritance the Khojas are governed by Hindu law. There is only one exception established, viz., as between a childless widow and a mother the latter is preferred to the former for the grant of letters of administration : 12 B H C R 294 (10). For a short period between 1911 and 1914 Beaman, J., sitting as a single Judge, threw a doubt on the correctness of the decisions of the Appeal Court presided over by Jenkins, C. J. and Russell, J. I shall summarise as briefly as possible the case-law cited to me on the question at issue. In (1847) Perry O C 110 (1), the daughter of a Khoja filed her bill against the executrices of her father's will that she, as a Mahomedan female, was entitled to a share in distribution of her father's property which was ordained in the Koran. The defendants met this demand by a plea that all the parties to the suit belonged to a certain caste or sect of Mahomedans called Khojas, which had existed from time immemorial, separate and distinct from other bodies or sects of Mahomedans, and under the government of divers laws and customs peculiar to themselves, and differing in many respects from the laws and customs of the Mahomedans : and the plea then averred a custom in the case by which the females were not entitled to any share of their father's property at his decease, nor to any benefit whatever except, if they should be unmarried, to maintenance out of the estate and to a sufficient sum to defray the expenses of their marriage according to their conditions in life.

Perry, C. J., came to the conclusion after an exhaustive inquiry that if a custom otherwise valid was found to prevail amongst a race of Eastern origin and non-Christian faith, a British Court of justice would give effect to it, if it does not conflict with any express Act of Legislature ; and he held that the attempt of the daughters to disturb the course of succession which had prevailed among their ancestors for many hundred years had failed and their appeals were dismissed with costs. In (1863) 1 B H C R 71 (11), the question was about the validity of a charitable bequest contained in the will of a Khoja, but the will itself was not challenged. In 1866, in 2 B H C R 276 (12), it was held that by a custom of the Khoja Mahomedans when a widow dies intestate and

9. Mahomed Haji Abu v. Khatubai, 1918 Bom 39=51 I C 513=43 Bom 647=21 Bom L R 85, on Appeal; Khatubai v. Md. Haji Abu, 1922 P C 414=72 I C 202=50 I A 108=47 Bom 146 (P C).

10. Hirbai v. Goribai, (1875) 12 B H C R 294.

11. Gangabai v. Thaver Mulla, (1863) 1 B H C R 71.

12. Karim Khatav v. Pardhan Manji, (1866) 2 B H C R 276.

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without issue, property acquired by her from her deceased husband does not descend to her own blood relations, but to the relations of her deceased husband. Couch, C. J. held, following Sir Erskine Perry, that if a custom as to succession is found to prevail amongst a sect of Mahomedans and is valid in other respects, the Court will give effect to it although it differs from the rule of succession laid down in the Koran. In fact the principle of Hindu law of succession was applied. In 1876, in 12 B H C R 281 (13), which was a special appeal decided by Westropp, C. J., it was held that it must be considered as a settled rule in Bombay that in the absence of sufficient evidence of usage to the contrary, the Hindu law is applicable in matters relating to property, inheritance and succession among Khoja Mahomedans. This decision as far as it applies to Hindu law of "property" has not been followed in later decisions. It has been held in subsequent decisions that the Hindu law of joint family property does not apply to Khojas. In the same volume in the case in 12 B H C R 294 (10), Sargent, C. J., held that in the absence of satisfactory proof of a custom, differing from the Hindu law, the Courts of this Presidency apply to Khojas the Hindu law of inheritance and succession. He held that:

The Khojas having been originally Hindus and converted from the Hindu religion by a Dai, or missionary of the Imam of the Ismailis, to the Mahomedan religion of the Shiah division and Imami Ismaili sub-division, and being partly regulated by Mahomedan law, partly by Hindu law and partly by custom, occupy a position so peculiar that the Courts do not apply to them when seeking to prove a custom of inheritance or succession differing from the Hindu law, the stringent rule that the custom must be proved to be ancient, invariable, and submitted to as legally binding, but will act upon satisfactory evidence that it has been the general custom and accepted as such by the great majority of the Khoja community.

As I have pointed out in the earlier portion of my judgment this really is not a case of adoption of any custom but retention of an old custom of succession and inheritance prior to the period of conversion. Sargent, C. J., further held that if a custom opposed to Hindu law be alleged to exist among Khojas, the burden of proof rests upon the person setting up that custom. This question of onus or burden of proof is a vital issue in all these cases. It is not correct to state that you must plead a custom opposed to Mahomedan law and prove it. On the contrary the true rule is that whoever alleges a custom derogatory to the Hindu law of succession or inheritance must prove it. No such custom derogatory to the Hindu law has ever been pleaded in the present suit. At p. 305 Sargent, C. J., summarised the decisions of this Court and observed that they satisfactorily showed that:

The Khojas have, for the last 25 years at least, been regarded by the Court in all questions of inheritance, as converted Hindus who originally retained their Hindu law of inheritance, which has since been modified by special customs, and that a uniform practice has prevailed during that period of applying Hindu law in all questions of inheritance, save and except where such a special custom has been proved.

He cited with approval the decision of Westropp, C. J., in the same volume where it was held that in the absence of proof of special custom, Hindu law of succession and inheritance must be administered in the case of Khojas. In 1877 in 3 Bom 34 (14), it was held that the widow of a Khoja, who died childless and intestate, succeeds to her husband's estate in preference to his sister. It was also pointed out in that case that where a defendant alleged a special custom among Khoja community in variance with the Hindu law of inheritance, it was held that the burden of proving the alleged custom rested upon her. In 1889 in 13 Bom 534 (15) it was held that it was not established that amongst Khojas there was any recognised right of a son to demand a partition in the lifetime of his father. The onus was again thrown on the party alleging such a right of partition in the case of Khojas to prove it. This case is the authority for the proposition that the Hindu law of joint family property does not apply to Khojas. The whole of the property possessed by a Khoja Mahomedan is his absolute property in which the sons acquire no interest by birth. It was observed that the rule, that the Hindu law as administered in this Presidency in the absence of proof of custom to the contrary is the law applicable to Khojas, is not to be understood in its widest sense, but as confined to simple questions of inherit-

13. Shivaji Hasam v. Datu Mavji Khoja, (1874) 12 B H C R 281.

14. Rahimatbai v. Hirbai, (1877) 3 Bom 34.
15. Ahmedbhoy Hubibhoy v. Cassumbhoy Ahmedbhoy, (1889) 13 Bom 534.

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ance and succession. Sargent, C. J., has in his judgment thus limited the question of inheritance and succession with reference to Hindu law of joint family property. It would be certainly a complex question of inheritance and succession if together with it the notion of Hindu law of joint family property is mixed up.

In 1901 in 26 Bom 319 (16) the will of a Khoja conferred an absolute gift, but directed that the property so given shall not be made over to the legatee until he had attained a certain age beyond the period of his majority. The direction was held to be inoperative unless the will conferred an interest in the property upon some person for the intervening period, and the legatee was entitled to have the property handed over to him as soon as he attained his majority. I have referred to this case only for the purpose of showing that although it was a Khoja will, only a question of construction was raised but the will itself was not challenged. In 1901 in 3 Bom L R 785 (17) Jenkins, C. J. held that the will of Sir Tharia Topan was to be construed according to the Hindu law. There also the question in dispute was as to the construction of the will, whether according to the law the grand-daughters took the property bequeathed to them as a class or as persona designata. Here again the will itself was not challenged.

In 1904 in 29 Bom 85 (18) it was held by Russell and Chandavarkar, JJ. that although a Khoja and his wife are married according to Mahomedan rites, at the time of his death so far as regards succession to his property he is a Hindu. If his brothers lived joint with him his widow would be entitled to maintenance out of his estate while his property devolved on them. Here the Hindu law of succession by survivorship was applied on the death of the deceased Khoja. It seems that the deceased and his brothers were living jointly and the property also was held by them jointly during the lifetime of the deceased. The principle of survivorship was thus applied to the exclusion of the widow who was held entitled to maintenance out of the estate.

It was in this case that Russell, J. pronounced the famous dictum that a Khoja was a living Mahomedan and a dead Hindu. He observed that a living Khoja by operation of law became a dead Hindu and his brothers living joint with him, his widow would on his death be entitled to maintenance only. In the same volume in the case of 29 Bom 133 (19) Jenkins, C. J. and Russell, J. had before them the will of a Khoja on a question of construction. Jenkins, C. J. made some very pertinent observations at p 148 of the report which are the sheet anchor of the learned counsel for the defendants in this suit. I prefer to quote the whole of that paragraph:

> But before we come to the question of construction, it is necessary first to *consider briefly the testamentary capacity of the testator.* He was, as I have said, a Khoja of Bombay, and although the community, of which he is a member, may popularly be reckoned Mahomedan, in some respects the civil rights of a Khoja are determined by the law governing Hindus in this Presidency: thus it is well established that on an intestacy the devolution of a Khoja's property is governed by the Hindu law. *But here we have not an intestacy but a disposition by will*, and so we must determine the measure of a Khoja's testamentary capacity. *In a recent case before this Court it was held on evidence there adduced that the law applicable to Hindus governed, and in this case it is agreed on all sides that this conclusion is sanctioned by the custom that prevails in Bombay.* It is common knowledge in legal circles that Khojas continually make their wills, as though they had the testamentary capacity of a Hindu; and counsel in this case, whose experience is of the widest, have informed the Court that they do not desire any issue to be raised on the point, for all parties are at one that *this will must be construed on the basis of the testator having the testamentary powers of a Hindu resident of Bombay.*

I wish to emphasize the words italicized in this quotation. It is a positive statement by the then learned Chief Justice that " in a recent case before this Court on evidence there adduced it was held that the law applicable to Hindus governed," and although unfortunately the proceedings of that case cannot be traced, that does not detract from the positive statement made in the judgment.

In this case not only the question of construction of a Khoja will was concerned, but the Court considered the question of the capacity of a Khoja to make a will. It is a case most direcly in point, and one would have imagined that

16. Hussenbhoy v. Ahmedbhoy, (1901) 26 Bom 319=4 Bom L R 336.
17. Sallay Mahomed v. Lady Janbai, (1901) 3 Bom L R 785.
18. Rashid Karmali v. Sherbanoo, (1904) 29 Bom 85=6 Bom L R 874.
19. Advocate General v. Karmali, (1903) 29 Bom 133=6 Bom L R 601.

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after an authoritative judgment of an Appeal Court presided over by an eminent Chief Justice which dealt directly with the issue of the capacity of a Khoja to make a will of the whole of his property, the question would never be raised again in this Court. It has recently been laid down that even the judgment of a single Judge should be treated as binding unless it is manifestly wrong; for nothing unsettles the law more than a single Judge trying to throw doubts on the correctness of an Appeal Court judgment. But that has happened in two subsequent cases, viz., 36 Bom 214 (20), in which there was a question of validity and construction of a trust deed, and 38 Bom 449 (21), which was a suit for partition. In these two cases Beaman, J., threw a doubt that the custom of disposing of the whole property by testamentary disposition was not proved. In neither case the question was directly in issue and in subsequent cases this expression of opinion has been treated as obiter His rigid logic that the Hindus were governed by Hindu law and Mahomedans were governed by Mahomedan law would not admit of any elasticity in the case of a sect of Imami Ismaili Khojas having retained the Hindu law of succession and inheritance. The whole of his reasoning was affected by the notion that the Hindu testamentary powers are inseparable from joint family property.

His argument in a nutshell was that if a dead Khoja is a Hindu then he as a Hindu can will away his self-acquired property and not the ancestral property and he therefore would like to restrict the testamentary powers of a dead Khoja to self-acquired property. With all respect, Beaman, J., lost sight of the fact that the Hindu law of joint family property has been held not to apply to Khojas. During his lifetime a Khoja is the absolute owner of the property he is possessed of. As I have pointed out his sons did not take any interest by birth, they could not claim partition of the property. It therefore necessarily follows that when he dies, he dies possessed of his property in which no other person during his lifetime had any interest. If the sons had no interest by birth during all the time that the father was alive, their rights cannot spring into existence on his death. It must therefore logically be assumed that whatever property he dies possessed of, a Khoja can dispose of the same by a testamentary disposition as if the property was his absolute property. In 1914, in 16 Bom L R 224 (22), Macleod, J., (as he then was) had before him the case of a joint family property of a Cutchi Memon, and the question before him was whether the son of a Cutchi Memon acquired by birth an interest in the property.

The question of inheritance and succession was again not before him, but he seems to have upheld Beaman, J's opinion that the decision in 29 Bom 133 (19), is not a correct statement of law. Beaman, J. would apply the Hindu law of joint family property to the extent of holding that the Hindu law of intestate succession would apply to the property of a deceased Khoja. It has been held in a series of cases that the law of wills is a part of the law of succession, and when it has been held that the Hindu law of succession and inheritance applies, there is hardly any justification for excluding testamentary succession Succession is either testamentary or intestate. S. 2, Succession Act, confirms this view. In 41 Bom 181 (23), Beaman, J. himself admits that wills belong more properly to the law of succession or inheritance than to any quite distinct law of their own. Even as early as 1863, in 1 B H C R 71 (11), Couch, C J., has held that the law of wills is a part of the law of inheritance and succession. A will is an instrument by which the devolution of an inheritance is prescribed, and in the civil law it is said that inheritance is of two kinds, ex testamento and ab intestato. In 41 Bom 181 (23) the question was with regard to the capacity of a Memon to make a will of the whole of the property. Memons are another sect of Mahomedans similarly converted about four hundred years ago. It has been found that they are more orthodox than the Khojas. Many wills by Khojas were produced in evidence to prove the custom and it was held that a Memon could will away the whole of his property. Under the Hindu Disposition of Property

20. Cassamally Jairajbhai v. Sir Currimbhoy Ebrahim, (1911) 36 Bom 214=12 I C 225=13 Bom L R 717.

21. Jan Mahomed v. Datu Jaffer, (1913) 38 Bom 449=22 I C 195=15 Bom L R 1044.

22. Mangaldas v Abdul Razak, 1914 Bom 17=23 I C 565=16 Bom L R 224.

23. Advocate-General of Bombay v. Jimbabai, 1915 Bom 151=31 I C 106=17 Bom L R 799=41 Bom 181.

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Act, 15 of 1916, S. 2 has been framed to validate the testamentary disposition by a Hindu for the benefit of persons not in existence at the date of his death. S. 5 of that Act refers to the Khoja community. It runs as follows:

Where the Governor-General in Council is of opinion that the Khoja community in British India or any part thereof desire that the provisions of this Act should be extended to such community, he may, by notification in the Gazette of India, declare that the provisions of this Act, with the substitution of the word 'Khojas' or 'Khoja', as the case may be, for the word 'Hindus' or 'Hindu' wherever those words occur, shall apply to that community in such area as may be specified in the notification, and this Act shall thereupon have effect accordingly.

I cite this section for the purpose of showing how the Indian legislature also has considered that the Hindu law of testamentary succession applies to the Khoja community. S. 2 of that Act is framed to validate the testamentary disposition by a Hindu for the benefit of persons not in existence at the date of his death. It makes an exception to the Hindu testamentary law of disposition. By S. 5 the Khoja community is invited to take the benefit of that exception if it so desires. Among the cases cited to me there were at least eight cases of wills, and although it would have been manifestly to the advantage of the parties to challenge the will, the same was not done. Assuming that it is true, as was contended by the learned counsel for the plaintiffs, that the question whether a Khoja is entitled to will away the whole of his property has never been squarely put or answered, I may pertinently refer to a decision in 51 I A 129 (24), where there Lordships of the Privy Council held that (p. 138):

When a long series of cases, extending over a long period of time, the parties being represented by eminent counsel, is decided in one way, and if an evident plea had been taken and upheld the decisions would have been the other way there arises an irresistible conclusion that the plea was not taken because it was felt to be bad.

In 29 Bom 133 (19), Jenkins, C. J., had this aspect in mind when he stated that (p. 148):

Counsel in this case, whose experience is of the widest, have informed the Court that they do not desire any issue to be raised on the point, for all parties are at one that this will must be construed on the basis of the testator having the testamentary powers of a Hindu resident of Bombay.

But as I have observed in the earlier part of my judgment, the question of the testamentary capacity of a Khoja was directly in issue before Jenkins, C. J., and Russell, J., in 29 Bom 133 (19), and it is a positive authority on the question in issue before me, and I feel bound by that decision. On a careful consideration of the authorities cited and arguments advanced, I find all issues in favour of the defendants and hold that a Khoja of the Shiah Ishna Ashari sect can dispose of the whole of his property by a testamentary disposition.

V.B./R.K. *Suit dismissed.*

A. I. R. 1936 Bombay 264

KANIA, J.

Pachan Ladha—Petitioner.

v.

Municipal Commissioner, Bombay — Opposite Party.

O. C. J. Misc. No. 60 of 1935, Decided on 26th November 1935.

(a) Bombay City Municipal Act (3 of 1888), S. 394—Discretion wide—Condition imposing restriction over liberty of applicant is not ultra vires of Commissioner.

The Municipal Commissioner of City of Bombay has, under S. 394 (4), a discretion to issue licenses referred to in sub-s. (1) subject to such restriction and conditions as he shall think fit to prescribe. He can even impose as a condition restrictions over the liberty of the applicant for license which he otherwise has. Hence although a resident in Bombay is allowed to use his premises for keeping ghee or butter without any license, and if he keeps any ghee or butter for sale which he is allowed to keep upto a maximum limit of four hundredweights without any license, a condition in a license for melting vegetable oil; imposing a restriction excluding ghee or butter from the premises in respect of which license has been issued is not ultra vires of the Commissioner or contrary to the Act: *Rex* v. *Dodds*, (1905) 2 *K B* 40, *Disting.* [P 266 C 1, 2]

(b) Bombay City Municipal Act (3 of 1888), S. 394 (4) (b) — Breach of conditions of license — Commissioner can refuse to renew it.

The Municipal Commissioner for City of Bombay has discretion to refuse to renew a license referred to in sub-s. (1), S. 394 to a party who deliberately committed breach of the condition of the license. If the condition be unauthorized the duty of the party holding the license is to go to Court and ask for a decision but not to take the law in his own hands, commit a breach of condition and then complain that the Commissioner had no authority to impose that condition: 27 *Bom* 307, *Disting.*; *Sharp* v. *Wakefield*, (1891) *A C* 173, *Ref.* [P 267 C 2; P 268 C 1]

24. Brij Narain v. Mangla Prasad, 1924 P C 50=77 I C 689=46 All 95=51 I A 129 (P C).

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M. A. Jinnah—for Petitioner.

B. J. Desai—for Opposite Party.

Judgment. — This is a petition filed against the Municipal Commissioner for the City of Bombay, praying that he be ordered forthwith to grant a license on the terms and conditions usual and proper, authorizing the petitioner to carry on, or be allowed to carry on, upon his premises in Bombay the trade or operation of melting vegetable oil.

The petitioner had been carrying on business in Bombay prior to March 1933, and held a license from the respondent, which contained inter alia condition 4-A, which ran as follows :

Ghee or butter or other animal fat, whether unmixed or mixed with vegetable oil or with other substance shall not be kept on the premises.

The license so granted expired on 31st March 1933. The respondent thereafter refused to renew licenses in Bombay for melting vegetable oil and it is alleged that among others he refused to renew the license of the petitioner also. On 19th July 1933, a complaint was filed under the directions of the respondent charging one Kheraj Ubhaiya with contravening the provisions of Ss. 394 and 479, City of Bombay Municipal Act, and contending that thereby an offence was committed under S. 471 of the Act. The complaint was that he had infringed condition 4-A of the license by keeping some ghee or butter on the premises in respect of which the license was granted to him. On 7th November 1933, the complaint was heard by the Presidency Magistrate, Third Court, and the accused's statement was recorded. The accused contended that as ghee was allowed to be kept up to four hundredweights without a license he had kept the same on the premises. The learned Magistrate acquitted the accused on 19th December 1933. From the record annexed to the petitioner's affidavit in rejoinder I do not find the reasons, if any, recorded by the learned Magistrate for that order.

After that order was made, it is alleged that prosecutions were launched against various persons (members of the association of which the petitioner is the leader) under the Prevention of Adulteration Act, 1925. One of the cases, which appears to have been treated as a test case, was brought in Revision Application No. 115 of 1934 to the High Court, and as in that case it was found that vegetable "tawda" was asked for and supplied, there was no question of conviction under that Act, and the conviction was quashed. After that decision was given, on 19th February 1935, the respondent issued a general circular intimating that he had decided to prohibit the melting of vegetable oil in the City of Bombay, and there was a general refusal to issue licenses to melt vegetable oil. On 15th June 1935, the present petition was filed. It appears that the respondent then took legal advice and intimated to the petitioner that he did not propose generally to refuse licenses, but was prepared to consider individual applications for license on their own merits. Prosecution launched under the respondent's directions on the ground that certain traders were carrying on business of melting vegetable oil without a license were dropped, presumably because those parties were carrying on the business after the general refusal to issue licenses was intimated to them. On 29th August 1935, the respondent, through his attorneys, informed the petitioner that the prosecutions launched as aforesaid would be withdrawn and he would consider each application for a license to melt vegetable oil on its merits. After considering the petitioner's application in that way he refused to issue a license to the petitioner. The petition therefore is pressed to a hearing. The relevant portions of S. 394, City of Bombay Municipal Act (3 of 1888) run as follows :

394. (1) Except under and in conformity with the terms and conditions of a license granted by the Commissioner no person shall—

(a) keep, in or upon any premises, for any purpose whatever,

(i) any article specified in Part I, Sch. M, or

(ii) any article specified in Part II, Sch. M, in excess of the quantity therein prescribed as the maximum quantity of such article which may at any one time be kept in or upon the same premises without a license ;

(d) carry on, or allow to be carried on, in or upon any premises

(i) any of the trades or operations connected with trade specified in part 4, Sch. M.

(4) It shall be in the discretion of the Commissioner:

(a) to grant any license referred to in sub-s. (1) subject to such restrictions or conditions (if any) as he shall think fit to prescribe, or

(b) to withhold any such license.

Part 2, Sch. M contains, inter alia, ghee kept for sale, and the maximum quantity which may be kept at any one time without a license . . . (4 cwts.); Gun powder (5 lbs.); Matches for lighting (1 gross

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boxes). Part 4, Sch. M mentions melting of vegetable oil. Having regard to the foregoing provisions, it is clear that the respondent has a discretion to issue licenses referred to in sub-s. (1) subject to such restrictions and conditions as he shall think fit to prescribe. On behalf of the petitioner it is contended that the imposition of condition 4-A in the license is not in accordance with the Municipal Act and is therefore ultra vires the Commissioner It is alleged that if the respondent insists on including that condition in the license, under the circumstances, there is a wrongful refusal to issue a license according to law. In respect of the exercise of the discretion it is contended on behalf of the petitioner that it should be exercised according to the rules of reason and justice and not according to private opinion, according to law and not humour; it is not to be arbitrary, vague and fanciful, but legal and regular; it must be exercised within the limits to which an honest man competent in the discharge of his office must confine himself. In support of this contention reliance is placed on the decision in (1891) A C 173 (1). It is lastly contended that the present attempt of the respondent to refuse a license to the petitioner, apart from anything else, is to serve an ulterior motive, viz., to prevent adulteration of vegetable oil with ghee within the town and island of Bombay. It is urged that however desirable that object be, it is not within the province of the respondent to take that object into consideration and exercise his discretion with a view to serve that end because that is not provided by the Act, and if there is any defect in the legislation, it is for the legislature to amend the law.

Having regard to the general words of discretion contained in S. 394, sub s. (4), the burden of proving that the respondent is wrong in his action is on the petitioner. In my opinion, the first contention that the imposition of condition 4-A is ultra vires the Commissioner is unsound. The respondent is given very wide discretion in the issue of licenses, and although a resident in Bombay is allowed to use his premises for keeping any quantity of ghee or butter without any license, and if he keeps any ghee or butter for sale, he is allowed to do so up to a maximum limit of four hundredweights without any license, it does not mean therefore that when he applies for a license which it is obligatory on him to obtain, the respondent is not entitled to impose as a condition restrictions over the liberty of the applicant which he otherwise had. In so far as it is considered by the respondent that the carrying on of the trade of melting vegetable oil requires exclusion of ghee or butter or other substances mentioned in condition 4-A from the premises, and in so far as the condition imposes restrictions only with regard to the premises in respect of which the license is issued, I do not see how the imposition of that condition is contrary to the Act or ultra vires the Commissioner. If the respondent by a general notification had intimated that anyone within the municipal limits to which the Act was applicable should not keep ghee for sale at all, or, not exceeding two or three hundredweights, his action would be contrary to the Act, because the Act fixes another limit.

The respondent has not purported to do anything of the kind. He only granted a license on condition that so far as those premises were concerned there should be no ghee or butter thereon. That condition does not restrict the liberty of the petitioner to keep ghee for sale up to a maximum of four hundred-weights in other premises or unlimited quantity of ghee in other premises if the same is not for sale. To read the Act otherwise would mean that although S. 394, sub-s. (4), gave a very wide discretion to the respondent, in fact there was no discretion, because every attempt on his part to lay down a condition in respect of the use of the premises would be restricting the liberty of the citizen to that extent and which restriction was not expressly permitted by the Act. When issuing a license for keeping gun-powder for an unlimited quantity, it would, in my opinion, be quite unsound to contend that the respondent was not entitled to impose a condition that the licensee shall not keep any match boxes on the premises. If the applicant's argument was accepted, that would be wrong, because in part 2, Sch. M it is provided that a resident in Bombay can keep five pounds of gun-powder without a license or one gross of match boxes also without a license. The decision in

1. Sharpe v. Wakefield, (1891) A C 173=60 L J M C 73=64 L T 180=39 W R 551=55 J P 197.

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(1905) 2 K B 40 (2) does not help the petitioner because in that case, as expressly stated by Collins, M. R., in his judgment at p. 45, the power to refuse the renewal of an existing license which was confined to five grounds stated in the Licensing Act, S. 1, was ignored, and the Justices of the licensing district demanded an undertaking from the licensee as to the conduct and management of the business which was not covered by the five grounds. For that reason it was considered that the imposition of that condition amounted to a refusal to renew a license on a ground beyond the five grounds mentioned in S. 1. Under the circumstances the petitioner's contention in this respect fails.

The learned counsel for the petitioner strongly relied on the decision in 27 Bom 307 (3). In that case the Commissioner of Police was given a discretion to refuse a license for any conveyance which he may consider to be unfit for the conveyance of the public. The Commissioner approved of a certain pattern of victoria as a public conveyance in Bombay and refused to grant licenses for victorias which did not conform to the pattern so approved. It was held that the refusal on that ground was illegal. The decision was clearly based on the principle that the discretion given was not absolute, but one which was to be exercised after the Commissioner had made himself acquainted with the conveyance to be licensed and had considered whether it, as an individual carriage, was fit for the conveyance of the public. Having regard to the limited discretion given to the Commissioner, that decision, in my opinion, does not help the petitioner.

The principles laid down in (1891) A C 173 (1), for the exercise of the discretion, even when the same is absolute in terms, are not disputed. The question is whether in the present case the respondent had exercised his discretion against those principles. The affidavits filed in these proceedings show that the respondent refused to issue a license to the petitioner in his discretion because in his opinion the petitioner had committed a breach of condition 4-A of the license previously granted to him. In para. 11 of his affidavit the respondent further stated as follows:

> The petitioner, inspite of the refusal to renew the said license, has wrongfully and illegally continued to carry on his business.

On behalf of the respondent it is urged that the refusal was on these two grounds, and even if the Court does not agree with the respondent, it was not a matter for the Court to inquire as to the sufficiency of the reasons. The only inquiry permissible to the Court was whether these reasons show that the discretion was not properly exercised in law and that the refusal was arbitrary, fanciful and mala fide and therefore illegal. It is pointed out by the petitioner that the Magistrate had acquitted another person who was prosecuted under the direction of the respondent for committing a breach of condition 4-A of the license similarly granted. It is, therefore, urged that the non-observance of that condition cannot be a proper ground for the exercise of the discretion to refuse a license. I am unable to accept this contention of the petitioner. Keeping ghee under four hundredweights does not require any license at all and if a resident within the municipal limits of Bombay kept ghee in that quantity on any premises he did not commit an offence under the Municipal Act. The penal sections of the Act do not make that act of the resident in Bombay punishable. The only complaint which could be made under the circumstances would be that condition 4-A of the license had been violated, but there again every breach of a condition of a license granted under the Act was not made a penal offence under the Municipal Act and the prosecution under the circumstances was bound to fail. Therefore, because an individual put up before the Magistrate for committing a breach of condition 4-A was acquitted, it did not follow that the imposition of that condition was ultra vires the Commissioner or was held to be so by a proper tribunal. In my opinion, if the respondent, in his discretion, considers that he would not issue a license to a party who deliberately committed a breach of the condition of the license, it will not be a wrongful use of the discretion given to him by the Act. If the condition was unauthorized, the duty of the party holding the license was to go to

2. Rex v. Dodds, (1905) 2 K B 40=74 L J K B 599=93 L T 319=53 W R 559=69 J P 210 =21 T L R 391.
3. Gell v. Taja Noora, (1903) 27 Bom 307=5 Bom L R 133.

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Court and ask for a decision, but not to take the law in his own hand, commit a breach of the condition and then complain that the respondent had no authority to impose that condition.

On behalf of the petitioner it is pointed out that the second ground now relied upon by the respondent was not put forward in the correspondence before the proceedings and the prosecutions launched against various parties, because they carried on the business of melting vegetable oil without obtaining license as provided by the Act, were dropped. It is urged that this ground was not, therefore, relied upon by the respondent. Although this petition was filed when there was a general refusal to issue licenses for melting vegetable oil, the subsequent correspondence shows that the respondent offered to consider individual applications on their merits and the petitioner thereupon applied to have a license and his application was individually considered by the respondent. In my opinion, the refusal to grant a license in pursuance of that application may be justified by the respondent on every ground which is open to him to urge at the time the petition comes on for hearing. By not specifically mentioning this ground in the correspondence he had not given up that ground, if it was open to him to rely on the same. Although the prosecutions launched against various parties, because they carried on business of melting vegetable oil without a license, were dropped even since August 1935, the petitioner had been carrying on that business and the respondent may take that factor into consideration. I do not think that the suggestion of the respondent that he took that factor into considerations indicates that he had failed to exercise the discretion vested in him according to law.

The last contention of the petitioner was that the exercise of the discretion was not bona fide as the object of the respondent was to stifle the business of manufacturing and selling a mixed product of vegetable oil and ghee in the market. In law the motives guiding the actions of parties are hardly relevant except in cases of this kind where a direct motive is attributed and on which footing the exercise of the discretion is challenged. Although he was not bound to do so the respondent had given in his affidavit the reasons why he refused to issue the license to the petitioner in response to his application. I have no reason to disbelieve that the respondent relied on these grounds and exercised his discretion against the petitioner. Even if the motives suggested by the petitioner existed (for which in any event there is no adequate proof), and if the Commissioner considered that as an additional factor, I am unable to hold that in doing so he had acted mala fide or by reason of his taking into consideration that factor the exercise of that discretion had become illegal or arbitrary. The result, therefore, is that the petitioner has failed in establishing his contentions and the petition must therefore be dismissed.

The present petition was filed on the ground that the general refusal of the respondent to issue licenses for melting vegetable oil was improper. After the correspondence ending with the letter of 29th August 1935, the parties agreed that the case should be considered on the footing that the petitioner had made an individual application and the same was refused. The subsequent proceedings in this petition had gone on that footing. The petitioner would in law be entitled to his costs up to 29th August 1935. He is saved the costs of a fresh petition to be filed with the necessary averments about his making an application for the issue of a license and the refusal of the respondent to grant the same. If such a petition had been filed, the respondent would be entitled to get the costs of his legal advisers pursuing such petition and the costs relating thereto. Considering all the circumstances, therefore, I make no order as to costs up to 29th August 1935. Petitioner to pay the respondent's costs of these proceedings thereafter, less Rs. 100.

V.B./R.K. *Petition dismissed.*

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BROOMFIELD AND N. J. WADIA, JJ.

Bomatu Bhadu Ghatole and *others*—Defendants—Appellants.

v.

Govardhandas Nanabhai Gujarathi and *others*—Plaintiffs—Respondents.

Second Appeals Nos. 568 and 716 of 1933, Decided on 10th December 1935, against decision of Dist. Judge, Jalgaon, in Appeal No. 43 of 1933.

(a) Limitation — Instalment decree for money—Default clause is for benefit of de-

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cree-holder and even after three years from date of default, decree-holder can apply to recover such instalments as have become due within three years of application.

Where a decree for money made payable by instalments and in default of the payment of one or more instalments whole of the decree becomes payable at once, it is open to the decree-holder to apply even after three years from the date of the default to recover such of the instalments as have become due within three years of the date of the application. The default clause is for the benefit of the judgment-creditor and his failure to avail himself of it should not deprive him of the remedy he would have had apart from the clause: 1936 *Bom* 17; 1928 *All* 629 (*F B*) and 1934 *All* 534, *Foll.*; 2 *Bom* 356; 1918 *Bom* 163; 1925 *Bom* 326, *Dissent.*; 27 *Bom* 1, *Ref.* [P 270 C 1]

(b) Decree—Execution—Attachment before judgment of immoveable property continued after decree—Application for recovery of amount due by attachment of moveable property is not illegal.

Where immoveable property of the defendant is attached before judgment and attachment continued after the decree, there is nothing illegal in an application to recover money found due by the decree by attachment and sale of the moveable property of the judgment-debtor: 13 *Bom* 237 and 12 *All* 64, *Disting.* [P 270 C 1]

W. B. Pradhan—for Appellants.

Ramnath Shivlal for *G. S. Gupte*—for Respondents.

Broomfield, J.—These appeals have been heard together as they involve a common question as to the law of limitation applicable to instalment decrees where the whole amount is made payable in default of one or more instalments. In the case from which Second Appeal No. 568 of 1933 arises, there was a consent decree for Rs. 769-2-9 with costs and future interest payable in four equal instalments, the first being due in January 1928. The decree also provided that "if any instalment remains unpaid, the defendants to pay all the moneys due in one sum after deduction of the payment already made, and in case the defendants fail to pay accordingly, the plaintiff may recover the amount due by sale through Court of the property under attachment." The vernacular expression for "the defendants do pay" is *dyavi*; the vernacular for "plaintiff may recover" is *vasul karun ghyavi*. On the point of the construction of the decree we take the view that the use of this subjunctive form implies that the judgment-creditor is given an option of recovering the whole amount in case of default, and not that the decree makes it compulsory to apply at once for the whole amount. The words *vasul karun ghyavi* may equally well be translated "may or should recover."

In this case no instalments were paid. So that if time were to run from the first default, an application for execution would be barred after three years from 1st February 1928. The darkhast which gave rise to the appeal was filed on 1st February 1932, and the judgment-creditor then applied to recover the whole amount due. But he gave up his claim for the first instalment and sought to recover the remaining instalments, all of which had fallen due. The District Judge agreeing with the trial Judge, held that the darkhast was in time. He applied the decision of the Privy Council in 59 I A 376 (1), and held that the provision in the decree allowing the whole amount to be recovered in case of default was one in favour of the judgment-creditor, and that if he did not avail himself of it, he did not thereby lose his right to recover the instalments as they fell due. In the other appeal, Second Appeal No. 716 of 1933, there was a consent decree for Rs. 2,798 with costs and future interest, which was made payable by annual instalments of Rs. 500, and it was provided that "in default of payment of any two instalments, the plaintiff do recover the whole amount then remaining due in one sum by sale of the property in suit." The vernacular for "do recover" is *vasul karavi*. In our opinion there is nothing in the language of these two decrees to justify any distinction being made between them, and in this case also we think that the judgment-creditor was given an option to recover the whole amount. The facts in this case were that the first instalment was made payable in January 1924, and four instalments were paid, viz. for the years 1924, 1925, 1926 and 1927. Instalments for 1928 and 1929 were not paid. The darkhast giving rise to the appeal was presented on 15th June 1932. The cause of action for the recovery of the whole amount arose on 1st February 1929, but the judgment-creditor gave up his claim for the instalments for 1928 and 1929 and prayed for the balance.

The Subordinate Judge held that the darkhast was in time. The District Judge, who, as it happens, was the same District Judge as in the other case, took the other view and held that it was time-barred.

1. Lasa Din v. Gulab Kunwar, 1932 P C 207=138 I C 779=59 I A 376=7 Luck 442 (P C).

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He relied on two cases of this Court, 27 Bom L R 461 (2) and 20 Bom L R 773 (3). The point in issue in both cases is directly covered by a recent decision of a Bench of this Court in 37 Bom L R 942 (4), where it was held by the learned Chief Justice and my learned brother N J. Wadia, that where a decree for money is made payable in instalments and in default of payment of any instalment the whole of the decree becomes payable immediately, it is open to the decree-holder to apply, even after three years from the date of the default, to recover such of the instalments as have become due within three years of the date of his application. The reasoning of the Judicial Committee in 59 I A 376 (1) was held to apply and 42 Bom 728 (3) was doubted and not followed.

The learned advocate who appears for the appellants in Second Appeal No. 568, contends that this decision is inconsistent with several previous decisions of this Court which, he says, have not been overruled by the Privy Council in the case referred to. Now it is a fact that no Bombay authorities were referred to in 59 I A 376 (1), and also as is pointed out at p. 384 of the report of that case, the important and difficult questions involved had to be decided without the assistance of counsel for the respondents. Moreover, it is clear, as Mr. Pardhan says, that in 59 I A 376 (1), their Lordships were concerned with a default clause in a mortgage bond and with Art. 132, Limitation Act, not with Art. 182 or Art 181, and it can hardly be said that they intended to lay down any general principle of law which would necessarily apply to any other article of the Limitation Act. The case 59 I A 376 (1) has been distinguished on that ground by a Full Bench of the Allahabad High Court in 57 All 108 (5) But, on the other hand, the point we have to decide depends not so much on the construction of any article of limitation as on the construction of the decrees. The question really is what is the effect of the default clause on the rights of the judgment-creditor. The construction placed by the Privy Council on a similar clause in a mortgage bond is not conclusive certainly, but may be regarded as a valuable criterion. I do not think it is possible to dispute the position that the default clause in an instalment decree is as much for the benefit of the creditor as a similar clause in a mortgage bond, and, if so, on principle it is difficult to see why the creditor's failure to avail himself of it should deprive him of the remedy he would have had, apart from the clause.

In support of the contrary view we have been referred to three cases, 2 Bom 356 (6), 42 Bom 728 (3) and 27 Bom L R 461 (2). In 2 Bom 356 (6) it was held that a decree payable by instalments, with a proviso that in default of payment of any one instalment the whole amount of the decree shall become payable at once, is barred, if application for execution be not made within three years from the date on which any one instalment fell due and was not paid. There is little discussion of the question in the judgment of Westropp, C. J., but the Court relied on an earliar Full Bench case, 1 Bom 125 (7), where reliance seems to have been placed on the rule laid down in 4 Q B 519 (8) The last mentioned case and also 2 Q B 509 (9) were cited in the argument before the Privy Council in 59 I A 376 (1). 4 Q B 519 (8) was not mentioned in the judgment, but as to 2 Q B 509 (9), their Lordships, at p. 385 of the report, made the comment that it is always dangerous to apply English decisions for the construction of an Indian Act. There is a reference to 2 Bom 356 (6) in 27 Bom 1 (10) Jenkins, C. J., observed in connexion with it (p. 9) :

> Notwithstanding the high respect that must at all times be yielded to the opinion of the learned Judges responsible for that decision, it undoubtedly detracts from its value that the case was unargued, and this disadvantage is, I think, apparent in the somewhat inconclusive reasoning on which the opinion is supported.

There are other criticisms in Sir Lawrence Jenkins' judgment which must be said, I think, to weaken the authority

2. Gulabrao v Magan, 1925 Bom 326 = 87 I C 769=27 Bom L R 461.
3. Raichand v. Dhondo, 1918 Bom 163=47 I C 313=20 Bom L R 773=42 Bom 728.
4. Veherbhai v Javer Soma, 1936 Bom 17=160 I C 527=60 Bom 62=37 Bom L R 942
5. Jawaharlal v. Mathura Prasad, 1934 All 661 =151 I C 585 = 1934 A L J 1035 = 57 All 108 (F B).
6. Dulsook Rattanchand v. Chugon Narrun' (1877) 2 Bom 356.
7. Gumna Dambershet v. Bhiku Hariba, (1875) 1 Bom 125 (F B).
8. Hemp v Garland, (1843) 4 Q B 519=3 G & D 402=12 L J Q B 134=7 Jur 302.
9. Reeves v Butcher, (1891) 2 Q B 509=60 L J Q B 619=65 L T 329=39 W R 626.
10. Kashiram v. Pandu, (1903) 27 Bom 1 = 4 Bom L R 688.

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of 2 Bom 356 (6) considerably. 42 Bom 728 (11) has been criticised by the learned Chief Justice in 37 Bom L R 942 (4). With respect I agree with his observations, and I may add this. The main ground on which Beaman, J., in 42 Bom 728 (11) seems to have held that the judgment-creditor is barred from applying for the instalments which are within time, is that if he be allowed this right, his right to apply for the whole amount of the decree may also be extended indefinitely He says (p. 730) :

The ground of appeal is that it was optional with him (the judgment-creditor) to waive all breaches on the part of the debtor to fulfil his obligations under the instalment decree and so at the very end of the eight years, sue for at least three instalments in arrears then due. If this view be correct, it follows that the creditor would likewise be entitled to sue, within three years of failure to pay the last instalment, for the total amount of debt with interest.

He goes on to say that :

The effect of acceding to this argument would be that no matter how complete the right to call in a definite sum of money had become, the judgment-creditor might ignore it and extend the period of limitation, perhaps to the extent of some 20 instead of 3 years, as for example, if the instalment decree had provided for the repayment of the capital sum over a period of 20 years.

With due deference, this reasoning seems to me to be fallacious On any view the claim to recover the whole amount of the debt on default of payment of one or more instalments must be barred within three years of the default either under Art. 182 or Art. 181, Limitation Act. The difficulty to which the learned Judge refers appears, therefore, to be non-existent, and his finding that the creditor's right to enforce the payment of the full amount upon breach of the condition puts an end to the instalment decree as an instalment decree, must be supported on some other ground. I am unable to see any reason why the decree should cease to be regarded as an instalment decree, unless indeed the terms of the decree itself make it clear that that result of the failure to pay the instalments in time was intended. That is to say, if the terms of the decree made it perfectly clear that the judgment-creditor had no option, and in case of default was bound to execute the decree for the full amount, then no doubt it might be said that the decree would cease to be an instalment decree. But, in the two cases with which we are concern d at any rate, the language of the decrees did allow an option to the judgment creditor either to apply for the full amout or to waive that privilege.

As to 27 Bom L R 461 (2), the decision there turned largely on the provisions of S. 48 Civil P. C., and, although Sir Norman Macleod has held in his judgment at p. 462 that the decree was no longer an instalment decree after default had been made, no reasons are given for that view. We think, therefore, that we are at liberty to follow, and we prefer to follow, the latest ruling of this Court in 37 Bom L R 942 (4), which is in accordance with the view taken by the Allahabad High Court in two recent cases in which the earlier rulings of that High Court have been reconsidered: 51 All 237 (12), a Full Bench decision, and 56 All 921 (13). We are all the more inclined to take this view, because, looking at the question apart from authority, it appears to be more consonant with justice and commonsense. We could hardly decline to follow 37 Bom L R 942 (4) We might, in view of the conflict of authority, have referred the matter to a Full Bench, but under the circumstances there seems to be no necessity to do so

There is one special point in Second Appeal No 568 which should be mentioned. The learned advocate for the appellant argued that apart from the point of limitation the darkhast should fail because it was not an application in accordance with law. The decree provided that in case of default the plaintiff might recover the amount due by sale through Court of the property under attachment. Certain immoveable property had been attached before judgment and this attachment was directed to continue until the whole amount was paid up. The relief prayed for in the darkhast, however, was the recovery of the sum due by attachment and sale of the moveable property of the judgment-debtor. That, it is contended, is not in accordance with law, and in support of that proposition we were referred to 13 Bom 237 (14) and 12 All

11. Raichand Motichand v. Dhondo Laxman, 1918 Bom 163=47 I C 313=42 Bom 728=20 Bom L R 773.

12. Joti Prasad v. Sri Chand, 1928 All 629=112 I C 73=26 A L J 966=51 All 237 (F B).

13. Ram Prasad Ram v. Jadunandan Upadhia, 1934 All 534=149 I C 598=1934 A L J 772 =56 All 921.

14. Pandharinath Bapuji v. Lilachand Hatibhai, (1888) 13 Bom 237.

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64 (15). I do not consider that these cases have any bearing on the present case. In the former there was an application made for possession of a house which was not mentioned in the decree at all. In the other case an application had been made for arrest of the judgment-debtor contrary to the provisions of S. 341 of the old Civil P. C., and there was also an application for the sale of property contrary to S. 99, T. P. Act. It is easy to see, therefore, why those applications should have been held to be not in accordance with law. But there is nothing illegal in an application to recover money found due by the decree by sale of the moveable property of the judgment-debtor. That is a method of execution the right to which is given by the Civil Procedure Code, and the right is not taken away in my opinion, because the decree gives the further right of recovering the money by sale of the attached immoveable property. I think, therefore, there is no substance in this point. A minor point was also mentioned in the other Appeal No. 716, in connection with the amount of future interest awarded. The trial Court has awarded future interest on Rs. 1,039-6-6 from 1st February 1930.

It is contended on behalf of the respondents that future interest should run from 15th June 1932, i. e. the date of the darkhast, because interest up to that date has been included. However, as the learned advocate for the respondents points out, the decree provided that interest should be payabe at six per cent, on the full amount Rs. 1,500 and not on any lesser amount. As it does not appear that the judgment-creditor has been awarded anything more than is due to him, we do not propose to interfere. The result of our finding on the question of limitation is that appeal No. 568 of 1933 is dismissed with costs. Appeal No. 716 of 1933 is allowed. The order of the District Judge is set aside and that of the Subordinate Judge restored with costs throughout.

N. J. Wadia, J.—I agree.

V.B./R.K. *Order accordingly.*

15. Chatter v. Newal Singh, (1889) 12 All 64=1889 A W N 200.

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BARLEE AND MACKLIN, JJ.

Ramchandra Mukundrao Kibe — Appellant.

v.

Servants of India Society—Respondent.

First Appeals Nos. 86 and 316 of 1928, Decided on 4th October 1935, from decision of First Class Sub-Judge, Poona, in Suit No. 47 of 1922.

(a) Bombay Pleaders Act (17 of 1920), S. 20 (c)—Appeal—First hearing—First hearing means day on which there is for first time hearing in Court—Parties engaging two pleaders before appeal actually heard, but not before date fixed in notice under R. 12, O. 41, Civil P. C.—Parties are entitled to fees of two pleaders.

The term 'first hearing' used in S. 20 means the day on which there is for the first time a hearing in Court. It does not refer to the date of the first hearing as fixed in the notice issued under O. 41, R. 12, Civil P. C.

Hence where parties to an appeal engage two pleaders before the appeal is actually heard, but not before the date fixed in notice for the hearing of the appeal, issued under O. 41, R. 12, the parties are entitled to fees to two pleaders. (The term 'first hearing' so far as it applies to appeals is meaningless and requires amendment): 1927 *Bom* 399, *Ref.*; *Civil Appeal No.* 585 *of* 1931, *Dissent.* [P 273 C 1, 2]

(b) Bombay Pleaders Act (17 of 1920), S. 20—Decision on merits means decision even on preliminary point from decree on merits in lower Court.

The words 'in any appeal decided on the merits' in S. 20 mean not a decision on the merits in the High Court, but a decision in the High Court even on a preliminary point from a decree on the merits in the lower Court. [P 273 C 2]

S. Y. Abhyankar and *P. S. Bakhale* for *S. R. Bakhale*—for Appellant.

M. R. Jaykar and *J. R. Gharpure*—for Respondent 3.

N. S. Anikhindi—for Respondent 4.

Barlee, J.—These appeals were decided on 4th October 1935 and both were dismissed with costs. Appeal No. 316 of 1928 was not decided on the merits but was dismissed because the appellant did not pay a sufficient Court-fee, and was not willing to rectify the omission. Appeal No. 86 of 1928 was decided on the merits. In speaking to the minutes in both these cases, the learned advocates ask for two sets of pleaders' fees under R. 97 in App. E at p. 49 of the Rules of the High Court of Judicature at Bombay, which is the same as S. 20, Bombay Pleaders Act.

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It has been decided in 51 Bom 492 (1) that, unless the Court otherwise directs, the fees of two pleaders should be allowed on taxation of the bill of costs in cases falling under Cls. (a), (b) and (c) of sub-s. (1) of S. 20, Bombay Pleaders' Act, 1920. Therefore the parties in these appeals are entitled to two sets of pleaders' fees as a matter of course, if they come within the provisions of S. 20, and the argument has been whether the conditions required of S. 20 have been fulfilled. S. 20 runs:

Where a party has, before the first hearing of a proceeding, engaged more than one pleader, the fees of two pleaders may be taxed in—

(a) any original suit of which the amount or value of the subject-matter exceeds Rs. 5,000;

(c) in any appeal to the High Court from a decree deciding on the merits any suit or contested proceeding of the kind referred to in clause (a) or clause (b).

The question we have to decide is whether the parties engaged more than one pleader before the first hearing of the appeal. The appeal was actually heard on 4th October and both sides had engaged two pleaders before that date, but not before the date fixed in the notice for the hearing of the appeal, which must have been some date in 1928. This point came before a Bench of this Court in *Kanayalal Manordas* v. *Gopaldas Chunilal* (2) when Baker, J., decided that the date fixed in the notice issued under O. 41, R. 12, must be taken to be the date of the first hearing for the purpose of S. 20, Bombay Pleaders' Act. The reason given by the learned Judge for adopting this opinion was in effect that, if the date fixed for hearing in the notice be not reckoned as the date of the first hearing, there can only be one hearing of an appeal and the rule becomes meaningless. This may be true. Nevertheless, with respect, we are not inclined to adopt that reasoning, since in our opinion it is not permissible for us to adopt an interpretation which in effect amounts to an amendment of the rule framed by the Legislature. The term "first hearing" is not a term of art. It is nowhere defined and in our opinion it must mean what it says, the day on which there is for the first time a hearing in Court. It is true that this interpretation renders this part of the rule meaningless; and in such circumstances a Court must adopt any possible interpretation rather than ignore a part of the rule. But we cannot go so far as to say that there was a hearing on a date when there was no hearing and could not have been one.

The truth is that the rule requires amendment. The term 'first hearing' has meaning when it applies to original suits, because in an original suit notices are issued either for settlement of issues or for final hearing. But it has no meaning, as far as we can see, with reference to an appeal. We, therefore, decide that the parties are entitled to fees of two pleaders, since they engaged more than two pleaders before the date of the hearing in this Court, as we are told they did. Mr. Gharpure objects that his opponent is not entitled to fees for two pleaders because his appeal was not decided on the merits but on a preliminary point of jurisdiction. But the rule is quite clear. "In any appeal decided on the merits" means not, as he contends, a decision on the merits in the High Court, but as it says, a decision in the High Court even on a preliminary point, from a decree on the merits in the lower Court.

Macklin, J.—I agree. As the case decided by Baker and Nanavati, JJ., does not appear in any authorised report, I think that we are at liberty, with respect, to disagree with their conclusion as to the meaning of the words "first hearing" occurring in S. 20, Bombay Pleaders' Act. It is true that when applied to appeals, the words "first hearing," if taken in their literal sense, will nearly always mean the only hearing; and the rule will then have no practical effect. To take the words as meaning the date of "first hearing given in the notice after admission," as has been done by the learned Judges who decided *Kanayalal Manordas* v. *Gopaldas Chunilal* (2), gets over the difficulty of the rule being otherwise nugatory; but any such interpretation is subject to a further difficulty of its own. It often happens that notices are not returned served; and the question would then arise whether the deciding factor would be an unserved notice fixing the date of first hearing, or a subsequent notice that was returned served. If, therefore, the interpretation put upon the words in that case is to be accepted, then the apparent meaning of the words will have to be still further extended. In the absence of a statutory definition

1. Tulsi v. Onkar Huna, 1927 Bom 399=102 I C 661=51 Bom 492=29 Bom L R 897.
2. Civil Appln. No. 585 of 1931, decided on 6th August 1931, by Baker and Nanavutty, JJ. (Unrep).

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I do not think that we should be justified in treating the meaning of the words "first hearing" as something entirely different from what it appears to be on the face of it. But I agree that S. 20 of the Act might usefully be amended so as to make it of some practical effect when applied to appeals.

V.B.B./R.K. *Order accordingly.*

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MACKLIN, J.

Raoji Bhavdu and *others*—Plaintiffs—Appellants.

v.

B. B. & C. I. Ry.—Defendants — Respondents.

Second Appeal No. 167 of 1932, Decided on 7th January 1936, from decision of Dist. Judge, Dhulia, in Appeal No. 159 of 1930.

Railways Act (1890), S. 72 — Agreement between Railway Company and consignor contained in condition 3 of railway receipt —Agreement stating that consignee must endorse receipt, if consignee does not attend and reserving to Railway Company discretion to deliver, in case receipt was not produced — Railway Company delivering goods to person producing receipt but without endorsement of consignee—Delivery held proper.

An agent sent certain goods by rail. The goods were consigned to self. It so happened that the goods were handed over to a third person who produced the receipt at the place of destination though there was no endorsement by the consignee. The railway receipt contained conditions for consignors one of which was that in case the consignee did not himself attend to take delivery he must endorse the receipt with a request to deliver it to the person whom he wishes. Further if the receipt was not produced, the goods might be withheld at the discretion of the railway company. The agent brought a suit claiming on the basis of this rule, that the railway company was bound to deliver goods only upon the production of the railway receipt either by the consignee, or by the person, in whose favour it was endorsed:

Held: that under S. 72, Railways Act, the responsibility of a railway as regards carriage of goods was that of a bailee and such responsibility might be limited only by special agreement. Thus under S. 72 there was no obligation to deliver goods to any particular person. Further, the condition in the railway receipt was only to protect the railway and was nothing more than a warning to the consignor. All it meant was that it was the duty of the consignee to endorse the receipt in the name of the person whom he wished to take delivery. The company reserved to itself wide discretion even when no receipt at all was produced; more so when it was produced by a person who showed some claim to take delivery. Thus the delivery was proper and Railway was liable in no way for the delivery of the goods. [P 275 C 1,2; P 276 C 1]

A. G. Desai and *C. K. Shah* for *D. B. Tilak*—for Appellants.

M. R. Jayakar and *J. G. Mody* — for Respondents.

Judgment.—The plaintiffs in this case are a firm of commission agents in Nandurbar. In March 1928 they bought on behalf of the firm Raghunathmal Satyanarayan & Co. a quantity of castor seeds and sent them by rail from Nandurbar to Bombay for the purpose of delivery being eventually taken by Raghunathmal Satyanarayan & Co. The railway receipt was made out in the name of the plaintiffs themselves (in other words the goods were consigned to self) and was handed over by the plaintiffs to one Bansilal, who was an agent of Raghunathmal Satyanarayan & Co. According to the plaintiffs the understanding between themselves and Bansilal was that Bansilal should forward the railway receipt to Raghunathmal Satyanarayan & Co., that Raghunathmal Satyanarayan & Co. should then remit the purchase price of the goods to the plaintiffs at Nandurbar along with the railway receipt, and that the railway receipt should then be re-transmitted from Nandurbar endorsed by the plaintiffs for delivery to Raghunathmal Satyanarayan & Co. It appears, however, that Bansilal himself sent the railway receipt to Raghunathmal Satyanarayan & Co. and they thereupon endorsed it to the Oza Agency; the Oza Agency endorsed it to Kalidas Narayandas, and Kalidas Narayandas finally endorsed it in favour of the carting agents, F. R. & Sons, who eventually took delivery of the goods from the railway in Bombay. The plaintiffs now sue the B. B. & C. I. Railway Company for the value of the consignment on the ground that the railway company was wrong in delivering the goods without an endorsement upon the railway receipt by the consignee himself.

The defence in the main was that under R. 3 printed on the back of the railway receipt there was no obligation upon the defendant company to deliver only to the endorsee of the consignee and that the plaintiffs were well aware of the mercantile usage by which goods conveyed by rail are delivered in practice to a person other than the endorsee of the

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consignee provided that the railway company is satisfied that that person is entitled to receive them. The trial Court rejected the contentions of the defendant and held that the railway company was bound to deliver only to the consignee or his nominee. The lower appellate Court took a contrary view and held that by delivering the railway receipt to Bansilal the plaintiffs treated him as their agent and that by commercial usage it was open to the railway company to deliver the goods to persons other than the consignee or his endorsee provided that the company was satisfied that such persons were the proper persons to receive the goods. The plaintiffs now come in second appeal.

Put shortly, the argument on behalf of the plaintiffs-appellants is that under S. 72, Railways Act, the responsibility of a railway administration as regards the carriage of goods is that of a bailee, which responsibility can be limited only by an agreement in writing in an approved form; that such agreement in an approved form is to be found in condition No. 3 of the conditions printed on the back of the railway receipt; and that no considerations of agency or mercantile custom can be of any effect to modify the responsibility imposed upon the railway company by condition No. 3. That means that the plaintiffs stand or fall by condition No. 3 on the back of the railway receipt, which they contend means that the railway company may deliver goods only upon the production of a railway receipt either by the consignee or by somebody nominated by the consignee himself to take delivery of the goods and endorsed as such upon the railway receipt.

Section 72, Railways Act, says that subject to the other provisions of the Railways Act the responsibility of a railway as regards carriage of goods is that of a bailee under Ss. 152 and 161, Contract Act, and is not that of a common carrier; and it further says that such responsibility can be limited only by special agreement in a proper form. The reference to the Contract Act means that as a carrier of goods the railway is bound to take as much care of the goods committed to its care for delivery as a man of ordinary prudence would take of his own goods of similar value, and that if it has done so, it is not responsible for the loss or destruction or deterioration of the goods, and lastly that, if the railway company through its own fault fails to deliver the goods at the proper time, it is responsible for any loss or destruction or deterioration of the goods that may take place from that time. Thus under S. 72, there is no obligation thrown upon a railway company to deliver the goods to any particular person; and the question is whether condition No. 3 printed on the back of every railway receipt imposes such a liability upon the railway company. The conditions on the back of the railway receipt are headed "Notice to consignors", and they run as follows:

The company hereby give public notice

* * * * * * * * *

(3) That the railway receipt given by the railway company for the articles delivered for conveyance must be given up at destination by the consignee to the railway company, or the railway may refuse to deliver, and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery.

If the consignee does not himself attend to take delivery, he must endorse on the receipt a request for delivery to the person to whom he wishes it made, and if the receipt is not produced the delivery of the goods may, at the discretion of the railway company, be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the railway company.

On behalf of the appellants it is contended that this condition prescribes both the rights and the liabilities of the railway company. On behalf of the defendant company it is contended that it deals only with the rights of the company and imposes no liability. In my opinion the contentions of the defendant company must prevail. To me it seems that the object of the rule is to protect the railway, and that what it imports is nothing more than a warning to the consignor that delivery may be refused by the railway company in the event of certain conditions imposed upon consignees not being observed. I am unable to see that it intends to import the converse, namely that if those conditions are not observed the railway company will on no account deliver the goods. To interpret the rule in that way seems to me to lay too much stress upon the word "must" appearing in the second part of the rule, When that word is used in the first half of the rule it clearly does not mean that failure to obey the rule will in every case, without exception, result in delivery being refused, because the rule runs "railway receipt must be given up or the

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railway may refuse delivery". Thus the word "must" does not convey in the first half of the rule any peremptory obligation, and I do not know why it should be interpreted in a different sense in the second half of the rule. I take it that the rule means neither more nor less than it says, namely that it is the duty of the consignee to endorse the receipt in favour of the person whom he wishes to take delivery.

It is clear from the latter half of the rule, dealing with the situation arising when no railway receipt at all is produced, that the railway company reserves to itself a wide discretion, and it seems to me to be anomalous for the railway company to reserve to itself a wide discretion when no railway receipt at all is produced but to reserve no discretion at all when a railway receipt is produced by a person who is able to show to the company some claim to be the rightful person to take delivery. Upon this interpretation of condition No. 3, on which alone the plaintiffs rely in their claim against the company, the other questions raised in the lower Courts regarding mercantile usage and the position of Bansilal as an agent of the consignee no longer survive for consideration, since the plaintiffs' case must fail upon the ground on which they now base it. I, therefore, think it unnecessary to call upon the parties to argue the rest of the case, and I dismiss this appeal with costs.

V.B.B./R.K. *Appeal dismissed.*

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MACKLIN, J.

Narshingappa Parasappa Chavan—Defendant—Appellant.

v.

Tippanna Bhimjeppa Santanavar and *another*—Plaintiffs—Respondents.

Second Appeal No. 343 of 1932, Decided on 11th December 1935, from decision of Dist. Judge, Dharwar, in Appeal No. 103 of 1931.

Mesne Profits—Agreement to sell without execution of formal conveyance—Subsequent sale to third person—Prior purchaser's suing for specific performance and obtaining decree and possession of land—Prior purchaser next suing subsequent transferee for mesne profits — Subsequent purchaser held not liable for mesne profits or damages, as his possession was not wrongful—Subsequent purchaser's knowledge of prior contract does not make him liable—He was held liable only for specific performance but not anything else.

An owner of lands agreed to sell his lands and accepted earnest money for the same but no conveyance was executed. Subsequently he sold the same to a third person. The prior purchaser brought a suit for specific performance of his agreement, impleading the vendor and subsequent purchaser as parties, and obtained a decree and possession of the lands in dispute. Afterwards the prior purchaser brought a suit against the subsequent transferee to recover mesne profits :

Held: that it could not be said that the subsequent purchaser's occupation of the land was in any way wrongful, since, until the prior purchasers became the actual owners of it by the execution of formal conveyance, the vendor remained the owner and was entitled to convey the land to the subsequent transferee, and the latter was thus entitled to regard himself as full owner. Mesne profits or damages were therefore inadmissible. The fact that the subsequent purchaser had notice of the prior contract of sale did not affect the question and the defendant was liable only for specific performance but not anything else: 1917 *Mad* 190, *Rel. on.* [P 277 C 1]

K. G. Datar for *G. V. Mokashi*—for Appellant.

B. Moropant—for Respondent 1.

Judgment.—The simple question at issue in this second appeal is whether the proper defendant in the case is the present appellant or whether he ought to have been the person who originally contracted to sell the land in suit to the plaintiffs. The plaintiffs had a contract for the purchase of certain land belonging to Usufsab, and in spite of the existence of that contract and the payment of earnest money. Usufsab subsequently sold the land to the present defendant. The plaintiffs were compelled to bring a suit on 12th September 1927 for specific performance of their contract, and in that suit they made both Usufsab and the present defendant parties. They obtained a decree for specific performance and they got possession of the property in July 1929. They now sue the defendant for mesne profits for the period 12th September 1927 to July 1929. Both the Courts have given them a decree. The learned District Judge who heard the appeal held that though the plaintiffs were not entitled to mesne profits as such, they not being full owners of the property during the period for which mesne profits were claimed, still they were entitled to damages for wrongful occupation by the defendant. Against this decree the defendant comes in second appeal. The only question is whether the defendant was the proper person to be sued. It cannot

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be said that the defendant's occupation of the land was in any way wrongful, since, until the plaintiffs became the actual owners of it by the execution of a formal conveyance, Usufsab remained the owner and was entitled to convey the land to the defendant and the defendant was thus entitled to regard himself as the full owner. Mesne profits are therefore inadmissible. That being so, is the defendant liable to pay damages? It is true that the defendant had notice of the prior contract of sale in favour of the plaintiffs; but I do not think that this affects the question. The only authority cited which appears to me in any way to the point is 30 M L J 559 (1). That was a case of a plaintiff who bought certain property with notice of a prior agreement of sale and sued to evict the persons in whose favour the prior agreement of sale had been effected; and it was held that he could not do so. In the course of the judgment it was said (p. 561):

... the contract by itself does not create a right *in rem*, but only creates a right *in personam* against the vendor and that obligation is made enforceable against the subequent purchaser, as an obligation *in personam* to a limited extent, namely to the extent of compelling him to give effect to the previous contract by way of specific performance, though *he is not liable in damages as the original vendor would be* . . . It is clear therefore that the subsequent transferee is not a simple trustee for the person holding the contract, but he is only a person who holds the property for the benefit of the contractee *to the extent necessary to give effect to the contract.* If the contract by itself does not create a right in rem in the property contracted to be sold . . . it cannot have any greater effect as against the *transferee with notice.*

I have italicized the words which seem to me to be of importance. On the authority of this decision I hold that the defendant in the present case was liable for the specific performance of the contract of sale in favour of the plaintiffs but not for anything else. The question of Usufsab's liability (if any) is not now in dispute, and on that point I am expressing no opinion. The appeal must be allowed and the suit of the plaintiffs dismissed with costs throughout.

V.B.B./R.K. *Suit dismissed.*

1. Thiruvenkatachariar v. Sheshadri Iyengar, 1917 Mad 190=34 I C 488=30 M L J 559.

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BROOMFIELD AND N. J. WADIA, JJ.

Shankar Atmaram Wani—Appellant.

v.

Keshav Govind Tambulkar and *others* —Respondents.

First Appeal No. 92 of 1932, Decided on 7th January 1936, from decision of First Class Sub-Judge, Jalgaon, in Darkhast No. 1606 of 1927.

(a) Civil P. C. (1908), Ss. 68, 71 and O. 21, R. 2—Collector executing decree is not "Court whose duty it is to execute the decree" within O. 21, R. 2 and application for adjustment must be made to civil Court who alone can record it.

A Collector executing a decree transferred to it under S. 68 is not a "Court whose duty it is to execute the decree" within the meaning of those words in R. 2 of O. 21, and consequently an application to certify an adjustment of a decree must be made to the civil Court who alone can record it and not to the Collector: 1925 *All* 146 and 1933 *Bom* 369, *Foll.*; 16 *All* 228 and 35 *Bom* 516, *Dissent.*; (1891) *A W N* 189; 1914 *Bom* 252; 37 *Bom* 32; 31 *Bom* 207 and 1924 *All* 307, *Ref.* [P 279 C 1]

(b) Civil P. C. (1908), O. 21, R. 2—Actual payment not necessary for valid adjustment.

It is not necessary that there should be an actual payment in order to constitute a valid adjustment within the meaning of O. 21, R 2: 1935 *Bom* 309 and 1933 *Mad* 28, *Ref.* [P 280 C 1]

P. V. Nijsure—for Appellant.

G. S. Gupte and *W. B. Pradhan* — for Respondents.

Broomfield, J.—These are companion appeals in execution proceedings from the orders of the First Class Subordinate Judge at Jalgaon disposing of two darkhasts in accordance with an adjustment set up by the respondents judgment-debtors. The facts of the case are somewhat complicated and must be set out at some little length. The plaintiff-appellant got a decree in Suit No. 102 of 1924 for Rs. 10,000 to be paid by annual instalments of Rs. 1,000. He filed a darkhast on 17th December 1927 to recover Rs. 3,217-9-0, the amount then due, by sale of the mortgaged property. This darkhast was No. 1606 of 1927 and it was transferred to the Collector for execution. The plaintiff had another decree in Suit No. 254 of 1923 against the defendants. This was for the amount of Rs. 14,500 payable by annual instalments of Rs. 2,000. The darkhast for the execution of this decree was filed on 17th August 1928 to recover Rs. 9,570 by sale of the mortgaged property. The

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first of these darkhasts is the subject of First Appeal No. 92 and the second is the subject of the companion appeal. While the proceedings in the first darkhast were going on before the Collector's subordinate, it is alleged that there was an adjustment of these two decrees and also of a third decree obtained by the plaintiff against the defendants in the Chalisgaon Court, the execution of which had not been commenced at the time of the alleged adjustment. Originally 4th January 1929 was fixed for the sale of the property, but the plaintiff had made various applications for fresh panchnamas in connexion with the valuation of the property. Finally he requested the Mahalkari, who was acting for the Collector, personally to inspect the property to be sold. Accordingly, on 24th January 1929, the Mahalkari went to the defendants' house and saw the property to be sold. The Sub-Registrar was also present at the invitation of the defendants and, as I say, it is alleged that on that day the parties came to terms adjusting the three decrees. The alleged terms were that the defendants were to convey two fields (Survey Nos. 135 and 136) to the plaintiff for the sum of Rs. 14,500. Out of this Rs. 1,500 were to be taken in part payment of the amount due in darkhast No. 1606 of 1927, and Rs. 13,000 were to be taken in part payment of the amount due under the second darkhast. The balance remaining in respect of these two decrees and also the amount due under the decree of the Chalisgaon Court were to be paid by yearly instalments of Rs. 1,000 each, commencing from January 1930. It was also agreed that the defendants were to pay off mortgages on the two fields transferred to the plaintiff and were to obtain possession from the tenants who were in occupation.

It is agreed by both parties that there was a discussion about a compromise on these lines on 24th January 1929. The plaintiff says that he never consented to the terms, but the defendants allege that he did consent and the contract was formally completed. Prior to this the plaintiff had applied to the Collector for permission to bid at the auction-sale. After some inquiry this permission was granted and the sale of the property was fixed for 22nd March 1929. On 20th March 1929, two days before the date fixed for the sale, defendant 1 sold another field of his to one Dodhu by a sale-deed (Ex. 57). His case is that this was done in order to pay off the mortgages on the two fields which were agreed to be transferred to the plaintiff. The sale-deed—Ex. 57—contains a recital of the alleged adjustment of the plaintiff's decrees against the defendants. The defendants' case is that up till this time the plaintiff had accepted the arrangement which had been agreed to on 24th January 1929; but late on the evening of this day (viz. 20th March), he suddenly changed his mind and repudiated the agreement. The defendants then made an application to the Subordinate Judge on 21st March 1929, alleging the adjustment of the decrees. The Court proceeded to hold an inquiry and held, after taking evidence, that the adjustment alleged by the defendants did actually take place. He thereupon passed orders in accordance with the adjustment, which have given rise to the present appeals.

The learned advocate who appears for the appellant-plaintiff has taken the following points: first, that as the execution proceedings had been transferred to the Collector, the Court had no jurisdiction to entertain the defendants' application or to record the adjustment of the decrees or to stay the sale; secondly, that the alleged agreement does not amount to an adjustment within the meaning of O. 21, R. 2, Civil P. C., and thirdly, that the alleged agreement has not been proved. The first point, which is the only one which had caused us any serious difficulty, was not taken in the lower Court nor does it find a place in the memorandum of appeal. Under O. 21, R. 2, any payment of money payable under a decree out of Court, and any adjustment of the decree in whole or in part, has to be certified to the Court whose duty it is to execute the decree. S. 71 of the Code provides that in executing a decree transferred for execution under S. 68 the Collector and his subordinates shall be deemed to be acting judicially. But the Collector is not a Court; if he were a Court it would not be necessary to make any such provision the object of which is that the Collector and his subordinates may be entitled to the benefit of the provisions of the Judicial Officers Protection Act, 18 of 1850. That the Collector is not a Court whose

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duty it is to execute a decree has been held in 47 All 217 (1) and 35 Bom 761 (2). In S. 70, Cl. (2), of the Code, it is provided that the power conferred by rules on the Collector shall not be exercisable by the Court, but it is conceded that the power to record adjustments under O. 21, R. 2, is not conferred by rules on the Collector. Powers which are not conferred on the Collector are exercisable by the Court, as held by Sir Lawrence Jenkins in 31 Bom 207 (3). Prima facie, therefore, the judgment-debtors' application to the Court was competent and the Court had jurisdiction to make the orders appealed against.

Mr. Nijsure relies on 16 All 228 (4). There it was held by Burkitt, J., sitting alone, that a joint application by a decree-holder and a judgment-debtor, stating that a decree had been adjusted, was properly made to the Collector as being within the meaning of S. 258, Civil P. C. (O. 21, R. 2), "the Court whose duty it is to execute the decree." This decision was in 1894 and I may point out that in 1891 another Judge of the Allahabad High Court (Mahmood, J.) had expressed a directly opposite opinion: (1891) A W N 189 (5). 16 All 228 (4) was discussed in 47 All 217 (1) and Mukerji, J., observed at p. 224 that:

> All that was held by Burkitt, J., was that it was the duty of the Collector to execute the decree and he was therefore properly seized of the application for adjustment.

The view that the Collector is a Court for the purpose of S. 258 was dissented from by both the learned Judges who decided this later case. 35 Bom L R 761 (2) is also a decision of a Bench of this Court against the view. 16 All 228 (4) has also been referred to in 38 Bom 673 (6), where Beaman, J. said that the principle underlying Burkitt, J.'s decision appears to have been that there cannot be two Courts executing the same decree at the same time. Another Bombay decision which has been referred to is 37 Bom 32 (7), where it was held that the Collector is the sole authority so far as the machinery necessary for the satisfaction of the decree is concerned. In that respect the discretion is his and no civil Court can interfere with it. But that discretion does not extend to any jurisdiction in the Collector to determine whether the decree itself has been satisfied or not. That jurisdiction is the civil Court's. It is that Court alone which is competent to determine the question judicially. These observations are hardly consistent with the view that the Collector can recognise an adjustment under O. 21, R. 2 of the Code. On the other hand 16 All 228 (4) was approved of in 35 Bom 516 (8) where it was held on the authority of this case that the intimation of an adjustment to the Collector, who was in charge of the execution, amounted to a due certifying of the adjustment of the decree, which satisfied the conditions of S. 258. It is by no means easy to reconcile this case with 35 Bom L R 761 (2) where it has been held that the Collector is not a Court executing a decree.

But even if we assume that the view taken in 16 All 228 (4) and 35 Bom 516 (8) is correct, it is one thing to hold that the Collector can take notice of an admitted adjustment but quite another to hold that he has power or that the Court has no power to inquire into the question as to whether there has been adjustment if the fact is disputed. The Collector's powers are confined to the execution of a decree transferred to him. If the decree is adjusted he is functus officio. That was one of the grounds for holding in 35 Bom 516 (8) that the fact of an adjustment may be reported to the Collector. Chandavarkar, J., says at p. 522 that:

> When a decree-holder intimates to the Collector that his decree has been satisfied, and that the necessity for its execution by the Collector has ceased to exist, the Collector's powers under Ss. 322 to 325 also cease, because the very foundation of them, consisting in the fact of a decree which is alive and capable of execution, has disappeared.

But 16 All 228 (4), whatever authority it may have in view of the criticisms of it in later cases, is no authority, nor is 35 Bom 516 (8) any authority for the

1. Bhagwan Das Marwari v. Suraj Prasad Singh, 1925 All 146=84 I C 1031=47 All 217=22 A L J 1060.
2. Balkrishnadas v. Malakajappa, 1933 Bom 369=148 I C 507=35 Bom L R 761.
3. Pita v. Chunilal, (1906) 31 Bom 207=9 Bom L R 15.
4. Muhammad Said Khan v. Payag Sahu, (1894) 16 All 228=1894 A W N 55.
5. Reait-un-nissa v. Haji Muhammad Ismail Khan, (1891) A W N 189.
6. Arjund Raghu v. Krishnaji, 1914 Bom 252=26 I C 266=38 Bom 673=16 Bom L R 637.
7. Bhurchand Hansraj v. Vira Champa, (1912) 37 Bom 32=17 I C 142=14 Bom L R 787.
8. Khushalchand v. Nandram Sahebram, (1911) 35 Bom 516.

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view that the Collector can inquire into and determine whether a decree has been adjusted or not. In that connexion I may refer to one other decision of the Allahabad High Court: 46 All 414 (9). It was held there that when a decree of a civil Court is transferred to a Collector for execution, the Collector has to find out the best way of raising money in order to satisfy the decree. He has absolute jurisdiction to choose the best method allowed to him by the law. But beyond this it is not within his province to decide how much money is due to the decree-holder and how much of the decree has been satisfied. The case in 37 Bom 32 (7) was cited with approval. It appears therefore that there are no grounds for holding that the learned Subordinate Judge acted without jurisdiction in entertaining this application. On the first point the appeal fails. Points (2) and (3) may be discussed together because the argument that the agreement between the parties did not amount to an adjustment is practically based on the merits of the case.

Mr. Nijsure contends that the evidence does not establish that the plaintiff agreed to the terms of the compromise. If there was a completed agreement between the parties as held by the learned trial Judge, and if the terms of the agreement were as set out by me in the beginning of this judgment, then in our opinion there can be no doubt whatever that there was an adjustment of the decree within the meaning of O. 21, R. 2. (His Lordship then discussed evidence on the point, and proceeded.) It was argued that this should not be regarded as an adjustment because there was no actual payment. In our opinion it is not necessary that there should be an actual payment in order to constitute a valid adjustment within the meaning of O. 21, R. 2. I recently had occasion to review the authorities on this question in 37 Bom L R 230 (10) and held that an agreement to accept a portion of the decretal amount, to be paid in instalments in full satisfaction of the decree, is an adjustment within the meaning of O. 21, R. 2. One at least of the many cases to which I have referred there—56 Mad 198 (11)—is clearly contrary to Mr. Nijsure's contention. But in any case we have here what would have amounted to an actual payment to the decree-holder. One of the terms of the agreement was that two fields were to be transferred to him at once, that is to say he was to receive his money's worth to the extent of Rs. 14,500. There is, in our opinion, no force in the argument of the learned advocate for the appellant that, if the evidence as to this agreement is accepted, the agreement would not amount to an adjustment as a matter of law; and, for the reasons I have given, we are satisfied that the evidence has been rightly relied upon. These findings are sufficient to dispose of both the appeals, which are accordingly dismissed with costs.

N. J. Wadia, J.—I agree.

V.B./R.K. *Appeals dismissed.*

9. Abdul Shakur v. Muhammad Matin, 1924 All 307=78 I C 429=46 All 414=22 A L J 202.

10. Kaliyanji Dhana v. Dharamsi Dhana & Co., 1935 Bom 309=157 I C 646=37 Bom L R 230.

11. Ramanarasu v. Venkata Reddi, 1933 Mad 28=141 I C 429=63 M L J 598=56 M 198.

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FULL BENCH

BEAUMONT, C. J., N. J. WADIA AND DIVATIA, JJ.

Kashinath Rudrappa Regal and *another*—Defendants—Appellants.

v.

Ramaya Rajana Pali—Plaintiff—Respondent.

First Appeal No. 180 of 1934, Decided on 23rd January 1936, from order of First Class Sub-Judge, Sholapur, in Darkhast No. 257 of 1934.

Dekkhan Agriculturists' Relief Act (17 of 1879), Ss. 15-B and 20—Mortgage decree directing sale of mortgaged property—Judgment-debtor can plead status as agriculturist and apply for permission to pay by instalments.

Where a decree is passed ex parte in a mortgage suit for sale of the mortgaged property and payment of the proceeds to the mortgagee, the defendant is entitled in execution to set up his status as an agriculturist and to ask for a modification of the decree by directing payment of instalments and consequential alterations in the order of the sale: 31 *Bom* 120, *Foll.*; 1924 *Bom* 305 and 1926 *Bom* 140, *Disting.*

[P 281 C 1]

S. S. Kavalekar—for Appellants.

P. V. Kane—for Respondent.

Beaumont, C. J.—This is a first appeal in execution from a judgment of the First Class Subordinate Judge of Sholapur. The appeal originally came before

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me, but I directed it to be heard by a Bench of three Judges, because I felt doubtful whether the decision in 26 Bom L R 153 (1), on which the learned advocate for the appellants relied, was rightly decided. On the present occasion further authorities have been referred to. The point which arises is a very short one and is this: Where a decree has been passed ex parte in a mortgage suit for sale of the mortgaged property and payment of the proceeds to the mortgagee, is the defendant entitled in execution to set up his status as an agriculturist and to ask for a modification of the decree by directing payment by instalments and consequential alterations in the order for sale?

The facts of the case are quite short. The suit is a suit on a mortgage bond and the preliminary decree was made ex parte on 21st September 1932, and on 4th October 1933 the final decree was made ex parte by which it was directed that the plaintiff do recover a sum of Rs. 9,934-4-0 and certain further sums, costs and interest, and that the mortgaged property mentioned in the preliminary decree be sold and that the proceeds of sale be paid into Court and dealt with by discharging the amount due under the preliminary decree. The present darkhast was filed on 13th February 1934, and it is on that darkhast that the defendant claimed to be held as an agriculturist. The learned Subordinate Judge dismissed the application holding that he could not go behind the decree for sale. As the decrees have not been set aside, no significance attaches to the fact that they were made ex parte.

Dealing with the matter, apart from authority, I should have thought that the order of the learned Judge was clearly right. It is a very well-settled principle that an execution Court cannot go behind the decree which it is called upon to execute, unless of course the legislature has authorized it to do so; but we should have to find clear words of authority to justify us in holding that the execution Court can go behind the decree. The section relied on in this case as conferring such authority is S. 15-B, Dekkhan Aagriculturists' Relief Act. I may point out that S. 20 of that Act is an instance of legislative authority under which the execution Court can go behind the decree; but that section had been held to apply only to decrees in money suits, in which in execution the defendant may give evidence that he is an agriculturist. S. 15-B deals with decrees in suits falling within S. 3, Cl. (y) or Cl. (z), and this suit falls, I think, clearly within S. 3, Cl. (y), because it is a suit for the sale of property in which the defendant is an agriculturist. I am of course assuming that the defendant proves that he is an agriculturist; if he fails in that, no question arises. The section provides that the Court, in passing a decree for redemption, foreclosure or sale in a suit covered by the Act, or in the course of any proceedings under a decree for redemption, foreclosure or sale passed in any such suit, may direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates and on such terms as to the payment of interest, and where the mortgagee is in possession, as to the appropriation of the profits and accounting therefor as it thinks fit. The section is not very well drafted.

In terms, it only applies, (so far as relates to cases of sale), to a decree for sale or a decree made in the course of proceedings made under the decree for sale. Strictly speaking the only decree for sale is the final decree, but taking the section as a whole, I have no doubt that it would enable an order for instalments to be made at any time up to the final decree. The question however is whether after the final decree for sale an order for payment by instalments can be made in execution. If it were merely a question of altering the decree from one for payment in a lump sum into one for payment by instalments, there would be no great difficulty. But it is plain that if the execution Court comes to the conclusion that the defendant is an agriculturist and makes an order for payment by instalments, it must go on to provide that the decree for sale is not to be executed according to its terms but is only to be executed in default of payment by instalments. Whether the default is to be in payment of one or more instalments and how much grace is to be allowed are matters which will have to be dealt with in the order. The absence from the section of any directions enabling the execution Court to modify the order for sale and draft a new order directing sale only in default of instalments, satisfies me that

1. Rudrappa v. Chanbasappa, 1924 Bom 305=80 I C 162=26 Bom L R 153.

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the section was never intended to give to an execution Court any power to direct payment by instalments after the decree absolute. That is the construction which I should put on the section if the matter were free from the authority, but it is not so free.

We have been referred to many cases; but the only one to which I wish to refer in any detail is the case 31 Bom 120 (2). In that case it was undoubtedly held that after a decree absolute for sale the Judge in execution could go into the question under S. 15-B whether the decretal amount should be paid by instalments. Russell, J., did not notice the difficulty which the decision involved, authorising the executing Court to set aside and re-draft the decree which it was supposed to be executing, but merely dealt with the question whether the decree referred to in S. 15-B was the decree nisi, or the decree nisi and decree absolute, and he held that both decrees were referred to in the section. With that part of the decision I agree. Beaman, J. did to some extent notice the difficulty to which I have referred and he gave, if I may say so, what seem to me to be cogent reasons for deciding the case in the opposite sense to that in which he did decide it.

He refers to an order for foreclosure and appears to admit that in the case of such an order it would be impossible to authorise the executing Court virtually to amend the order by granting a decree for payment by instalments. But he draws a distinction between the case of a decree absolute for sale and a decree for foreclosure for which I can find no justification in the section. It appears to me that, under an order for sale, to allow the money to be paid by instalments in effect annuls the order for sale in default of payment of a lump sum. I myself should have decided that case in the opposite sense to that in which it was decided, but we cannot ignore the fact that the case was decided as long ago as 1906. It has stood for nearly 30 years and does not appear to have been criticised. I have no doubt that many orders have been made, and sales have taken place, under the aegis of that authority, and I think we should not be justified at this distance of time in overruling it. The other cases which have been referred to do not present the same difficulty. The case in 26 Bom L R 153 (1), on which reliance is placed, purports to be a decision under S. 15-B, Dekkhan Agriculturists' Relief Act, and if it were a decision under S. 15-B, it would no doubt be in favour of the present appellants' contention. But we sent for the record from which it appears that the suit was one on a promissory note and was therefore a suit which fell under S. 20 of the Act, and to which S. 15-B had no application. This fact seems to have been lost sight of by the learned Judges who decided it. The case in 27 Bom L R 1490 (3) follows the case in 26 Bom L R 153 (1), and is also a case of a money decree. In my opinion none of the other cases cited has any real bearing on the point before us, and the conclusion I reach is that we ought to follow 31 Bom 120 (2), whether we agree or not with the decision.

We therefore allow this appeal and refer the matter back to the trial Court to deal with the question whether the defendant was an agriculturist at the material date on the merits, and to make an appropriate order according to its finding. Costs to be costs in the cause.

N. J. Wadia, J.—I agree. The question raised in this appeal is another example of the difficulties created by the loose and unsatisfactory wording of the Dekkhan Agriculturists' Relief Act. It is not easy to say from the language of S. 15-B whether it was the intention of the legislature to give power to the Court to direct instalments even after a decree absolute for sale. The difficulties created by such an interpretation are obvious and were cogently pointed out by Beaman, J., in his judgment in 8 Bom L R 963 (2). The section does not expressly empower the Court to go behind the decree as S. 20 does. On the other hand it is difficult to say, without doing some violence to the language of the section, that the decree for sale referred to in it does not include a decree absolute as much as a decree nisi. The interpretation put upon the section in 8 Bom L R 963 (2) is one which has been accepted now for 30 years, and I agree with my Lord the Chief Justice that it would be difficult for us to differ from that view without giving rise to considerable difficulty. I agree therefore that the appeal must be allowed.

2. Mancherji v. Thakordas, (1906) 31 Bom 120 =8 Bom L R 963.

3. Shidraj v. Renaki, 1926 Bom 140 = 92 I C 554=27 Bom L R 1490.

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Divatia, J.—This case affords one more illustration of the oft-repeated criticism that the Dekkhan Agriculturists' Relief Act is a badly drafted statute. At various places in the Act, the legislature has used language which has landed the Courts in great difficulty in construing the sections and in finding out the intention of the legislature. In this case the phrase that has to be construed is: "in the course of any proceedings under a decree for redemption, foreclosure or sale passed in any such suit" in S. 15-B of the Act. Ss. 20, 21 and 22 of the Act have been enacted in order to give certain benefits to agriculturists about grant of instalments, exemption from arrest as well as attachment even for the first time in execution proceedings. S. 20, which deals with the grant of instalments, has been construed as limited only to decrees in money suits, and it was therefore probably thought advisable to amend the Act by enacting S. 15-B, so as to grant the benefit to agriculturists of paying off a mortgage decree by instalments in certain cases. With regard to the grant of instalments before or at the time of passing a final decree, there is no difficulty; but if it was the intention of the legislature that agriculturists should get a similar benefit even in execution after a final decree for redemption, foreclosure or sale was passed, it is expressed in language which is not free from doubt and difficulty. It is difficult to understand how the question about grant of instalments would arise after the passing of a final decree for foreclosure, and even with regard to such a decree for sale, it is a question whether the legislature intended that instalments may be granted to a mortgagor at any stage in execution proceedings, even after the sale takes place and before the execution proceedings are finally disposed of.

I agree with the criticism which my Lord the Chief Justice has just made of the case in 31 Bom 120 (2). Beaman, J. tried to solve the difficulty by saying that the language of the section was advisedly loose and general. But the looseness of the language makes the task of the Court more difficult in applying the section. However, as the interpretation put in that case is favourable to agriculturists for whose relief the Act was passed, and as that decision has been apparently accepted for a long time, I agree that it should not be now disturbed. At the same time I trust that this as well as other defects in the Act which have been pointed out by this Court from time to time will receive the earnest attention of the legislature at no distant date.

R.M./R.K. *Appeal allowed.*

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DIVATIA, J.

Vithal Tukaram Kulkarni—Plaintiff—Appellant.

v.

Balu Bapu Gude and *others*—Defendants—Respondents.

Second Appeals Nos. 945 and 946 of 1931, Decided on 5th September 1935, from decision of Dist. Judge, Sholapur, in Appeal No. 109 of 1930.

(a) Hindu Law — Succession — Stridhan—Widow married in approved form succeeding to stridhan (other than shulka) and dying without heirs—Her brother and sister succeed equally.

Where a Hindu widow married in an approved form succeeds to stridhan property (other than shulka) and dies without leaving any issue or any heir in her husband's family, her brother and sister succeed equally to her stridhan property on her death: *Case law discussed.* [P 285 C 1]

(b) Hindu Law—Application of.

Where there is no express provision of Hindu law, the principle of justice, equity and good conscience should prevail: 37 *Mad* 396, *Foll.* [P 285 C 1]

P. V. Kane and *B. N. Gokhale*—for Appellant.

G. B. Chitale—for Respondents.

Divatia, J.—The only question in both these appeals is, "whether the brother or the sister, or both, of a deceased Hindu widow married in an approved form succeed to her stridhan property (other than shulka) if she dies without leaving any issue or any heir in her husband's family." The appellant contends that the sister alone or in the alternative the brother and sister equally succeed, while the respondents' case is that the brother alone is the heir to the exclusion of the sister. The point arises in this way: One Suganda a Hindu widow, died without having any issue. No heir in her husband's family also can be traced. Her mother Renuka, had one-fourth share in certain property and on her death she left one son Bapu, and two daughters, Limba and the said Suganda. That one-fourth share being Renuka's stridhan property devolved on

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her daughters Limba and Suganda to the exclusion of Bapu, so that each of them took one-eighth share. The succession to the one-eighth share of Suganda is now in dispute between her brother and her sister who has sold whatever share she has in Renuka's property to the appellant. The point is not covered by any authority nor is there any express text bearing on it. The decided cases have gone to the extent of holding that in the absence of her issue as well as her husband and his heirs, her blood relations in her father's family succeed, and they succeed in preference to the Crown: 45 Bom 1106 (1), 37 Mad 293 (2) and 48 All 663 (3). But the order of succession among such relations is not defined or indicated. The lower Courts have decided in favour of the brother, relying on the opinion expressed by the learned authors of West and Majid's Hindu Law, Edn. 4, p. 508, which is as follows:

If, therefore, the right of the widow's own blood relations revives on failure of the husband's Sapindas, it seems natural to allow them to succeed in the same order as they would have done before her marriage, and to place the mother first, next the father, and after him the brothers, and the rest of the Sapindas, according to the nearness of their relationship.

What is meant is that the succession should be the same as it would be in case she had died as a maiden, though the particular order of succession stated in this passage is not to a maiden but to a woman married in an unapproved form. It is necessary, therefore, to see whether this analogy is correct and well founded on principle. The Mitakshara texts have divided succession to stridhan property (except what is known as shulka, i. e. bride price or a dowry) into three parts: succession to (1) a maiden, (2) a woman married in a regular or approved form, and (3) a woman married in an irregular or unapproved form. The succession to a maiden's property is governed by a special rule based on a text of Baudhayana: "The wealth of a deceased damsel, let the uterine brothers themselves take. On failure of them shall it belong to the mother, or if she be dead to the father." This has been supplemented by Viramitrodaya that "on failure of the mother and father, it goes to their nearest relations." The latter expression "nearest relations" has been construed by our High Court to mean father's sapindas first, and then the sapindas of the mother who are the same as the sapindas of the deceased maiden: 32 Bom 409 (4). It would thus appear that this is a special order in which the brother is given first preference and the sister would come after the parents. Why the brother comes first, the texts do not explain.

Next we come to succession to a married woman. A distinction has been made in the texts between marriage in one of four regular or approved forms and marriage in one of the four irregular or unapproved forms. That distinction is obsolete now as all marriages must, under the present law be presumed to be of the Brahma, i. e. approved form, but the distinction rested on the important ground that in the case of an approved marriage the woman ceases to belong to her father's family and enters the husband's family and takes his gotra, while in an unapproved marriage, as she has not been given away by the father in marriage, she continues to be a member of the father's family, and therefore her gotra continues to be the father's and not the husband's. The result is that in the latter case the husband and his kinsmen do not come in the order of succession at all, and the property goes to her issue and then to her mother, father, the father's heirs and the mother's heirs respectively, while in the former case it goes to her issue, then to her husband, husband's heirs and her blood relations, on failure of each: 36 Bom 339 (5). Thus in the case of an unapproved marriage, the brother is preferred to the sister because he is a nearer heir to the father than the sister, and that would also be the result in the case of succession to a maiden though not exactly for the same reason, but because the brother is mentioned first even before the parents, in the special order of succession.

But should the result be the same in case of succession to a woman married in an approved form? As her gotra is her husband's, her relations in her father's

1. Ganpat Rama v. Secretary of State, 1921 Bom 138=62 I C 109=45 Bom 1106=23 Bom L R 462.
2. Kanakammal v. Ananthamathi Ammal, (1912) 37 Mad 293=25 I C 901.
3. Moti Chand v. Kalika Nand Singh, 1926 All 663=97 I C 245=48 All 663=24 A L J 753.
4. Janglubai v. Jetha Appaji, (1908) 32 Bom 409=10 Bom L R 522.
5. Tukaram v. Narayan Ramchandra, (1911) 36 Bom 339=14 I C 438=14 Bom L R 89 (F B).

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family are not her sagotra sapindas but bhinnagotra sapindas, i. e. bandhus, while in the case of a maiden as well as a woman married in an unapproved form, they remain her sagotra sapindas. The distinction is important because if they take as bandhus, the Mitakshara rule is that they take in order of propinquity, that bandhus related equally take in equal shares and no preference is given to males over females: 47 Bom 48 (6) and 17 Bom 758 (7). The result would be that the brother and sister would divide the property between themselves in equal shares. The analogy of the order of succession to a maiden is inapplicable as the change of gotra makes a material difference between the respective positions of a maiden and a married daughter in the family. Besides, the order of succession to a maiden is governed by a special text, and there being no similar text for a married woman it should be governed by the ordinary Hindu law under which the brother and sister would be bandhus, and even they would come in only in the absence of the husband or his heirs. The fact that her husband's heirs have preference to her blood relations, shows that a distinction is recognised between the two families, and that distinction can rest only on the fact that she belongs to her husband's family and is absorbed in his gotra, with the result that her blood relations would only be her bandhus, and succeed as such after the heirs in her husband's family are exhausted.

I think therefore that it is more in consonance with law as well as equity that the brother and sister should take equally than that the former should succeed exclusively. That seems to me to be a legal as well as equitable view. It is a recognised rule that where there is no express provision of Hindu law, the principle of justice, equity and good conscience should prevail: 37 Mad 396 (8). The first alternative argument urged on behalf of the appellant that the sister is the exclusive heir of the stridhan property, is untenable as the preference of the females to the male heirs to such property under the Mitakshara rule is confined to issue, i. e. lineal succession only, and does not apply to collateral succession. In the result, therefore, the decrees of the lower Courts are varied by declaring that the appellant has become the owner of 3/16th share instead of 1/4th share as claimed by him in civil suit No. 1138 of 1927, and plaintiff in suit No. 47 of 1929 is entitled to 1/16th share instead of 1/8th claimed in the suit property. The parties will be entitled to proportionate mesne profits. In other respects the decrees are confirmed. Parties to bear their own costs throughout.

R.M./R.K. *Decrees varied.*

6. Rajeppa v. Gangappa, 1922 Bom 420=77 I C 219=24 Bom L R 789=47 Bom 48.

7. Manilal Rewadat v. Bai Rewa, (1892) 17 Bom 758.

8. Meenakshi Ammal v. Rama Aiyar, (1912) 37 Mad 396=18 I C 34=24 M L J 105.

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BEAUMONT, C. J. AND RANGNEKAR, J.

Shriram Surajmal—Appellant.

v.

Shriram Jhunjhunwalla—Respdt. 1.

O. C. J. Appeal No. 55 of 1935, Decided on 13th March 1936.

Civil P. C. (1908), O. 8, R. 5—Defendant not putting in any pleading—Defendant is bound by all allegations in plaint.

Under O. 8, R. 5, every allegation of fact in the plaint must be taken as admitted unless denied or stated to be not admitted in the pleading of the defendant. Hence where there is no pleading of the defendant, there can be no denial or non-admission on his part and he is bound by all the allegations in the plaint: 1917 *Cal 269, Dissent.* [P 285 C 2]

M. V. Desai—for Appellant.

Jamshed Kanga and *M. C. Chagla*—for Respondent 1.

Beaumont, C. J.—I only desire to add a few words on a subsidiary point argued by Mr. Desai. It was argued that defendants 7 to 9 failing to put in a written statement were not to be taken as having admitted the allegations in the plaint, and in support of his argument Mr. Desai referred to the case in 45 Cal 1001 (1), in which the learned Chief Justice, in referring to O. 8, R. 5, said that it was clear from the wording of that rule that it is only intended to apply to a case where a pleading has been put in by the defendant and does not apply to a case in which the defendant has put in no pleading. I desire for myself to say that I emphatically dissent from that view. O. 8, R. 5, provides that every allegation in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted, except as against a person under disability.

1. Ross & Co. v. Scriven, 1917 Cal 269=34 I C 235=43 Cal 1001=20 C W N 1192.

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The rule down to that point is in substantially the same terms as O. 19, R. 13, of the Rules of the Supreme Court, and it seems to me to provide in terms that every allegation of fact in the plaint must be taken as admitted unless denied or stated to be not admitted in the pleading of the defendant. If there is no pleading of the defendant, it is obvious that it can contain no denial or non-admission. I have myself never heard it suggested that the English rule does not apply to a defendant who does not put in a defence.

There is, however, a proviso to O. 8, R. 5, which does not appear in the English rule. That proviso enables the Court in its discretion to require any fact so admitted to be proved otherwise than by such admission. In this country, where false suits are not unknown, the power may often usefully be exercised in practice, but if the Court does not exercise such power, it seems to me plain that a defendant who has not put in a defence is bound by all the allegations in the plaint, and I think, therefore, that in this case defendants 7 to 9 were bound by all allegations in the plaint.

D.S./R.K. *Order accordingly.*

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MACKLIN, J.

Talakchand Kasturchand—Appellant.

v.

Bhau Maruti Giranje—Respondent.

Second Appeal No. 532 of 1932, Decided on 13th January 1936, from decision of Assistant Judge, Poona, in Appeal No. 196 of 1931.

Dekkhan Agriculturists' Relief Act (17 of 1879)—Consideration of mortgage consisting of a duly executed havala — Burden of proving failure of consideration is upon mortgagor even under the Act.

Where the consideration of a mortgage deed consists of a duly executed havala (undertaking), the burden of proving failure of consideration is upon the mortgagor if he wishes to escape liability under it. There is nothing in the Dekkhan Agriculturists' Relief Act, which throws the burden of proving consideration upon the mortgagee. What the Act says is that the Court shall satisfy itself on certain matters including consideration and no burden is thrown either upon the mortgagor or mortgagee. [P 286 C 2]

G. N. Thakor and *J. G. Rele* — for Appellants.

V. B. Karnik—for Respondent.

Judgment.—This action was instituted by the plaintiff upon a mortgage executed in his favour by the defendant for a sum of Rs. 2,000. Both the trial Court and the lower appellate Court dismissed the suit on the ground that the consideration was not proved. The plaintiff comes in second appeal. According to the plaintiff, the history of the transactions was that one Namdeo was a debtor of Walve, who owed Rs. 27,000 to the plaintiff. The defendant bought the sugar-cane crop of Namdeo; but instead of paying Namdeo direct he undertook the liabilty of paying Namdeo's debt to Walve, and in order to pay off that debt by Namdeo to Walve he went to the plaintiff and executed the mortgage in suit, as the result of which the plaintiff gave Walve a credit of Rs. 2,000 on account of what was owing from Walve to the plaintiff, and Walve at the same time gave the defendant a credit of Rs. 2,000 against the liability which the defendant had accepted to Walve on behalf of Namdeo. The deed itself begins in these words:

> We have to pay our dues to the shop of Maruti Vithoba Walve. You have taken havala for the payment of those dues, which amount to Rs. 2,000. I shall pay interest at the rate of one per cent per month on Rs. 2,000.

And then follow the details of the property mortgaged. There is the Sub-Registrar's endorsement as follows:

> After this document, which was written in my presence, was read out to Maruti Bahiru, and Bhau Maruti Giranje in such audible tone as would enable them to hear, they have this day put their signatures thereupon in my presence.

The reasons which have led both the Courts to a finding against the plaintiff on the question of consideration is that they think that the plaintiff was bound to prove the transaction between the defendant and Namdeo and subsequently between the defendant and Walve, and that the plaintiff has failed to prove this. But the ordinary rule of law is that the executant of a document of this kind has to prove failure of consideration if he wishes to escape liability under the document, not that the person in whose favour the document is executed has to prove that there was consideration. There is a wide-spread feeling that under the Dekkhan Agriculturists' Relief Act it is for the plaintiff in such cases to prove consideration. That is not so. There is nothing in the Act which throws the burden of proving consideration upon the plaintiff. What the Act says is that the Court shall satisfy itself on certain matters, including consideration; so that in all

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such cases the correct frame of the issue would be "what was the consideration?" with the burden thrown neither on the plaintiff nor on the defendant. Now, in the present case, if the burden is not thrown upon the plaintiff, it seems to me that it would be very difficult for any Court to come to a conclusion that the consideration was something other than Rs. 2,000. We have in the first place the admitted fact that the dealings between the plaintiff and the defendant during the past eight or nine years have amounted to about Rs. 90,000, and the defendant himself says that at this moment the plaintiff owes him about Rupees 25,000.

Thus on the defendant's own showing the defendant, though technically an agriculturist, is a man of large dealings. He is also literate.; and when he says at the beginning of a solemn document that his dues to the Walve shop are Rs. 2,000, and that the plaintiff has undertaken to pay those dues amounting to that sum, and when he reaffirms the admission contained in the document itself by signing the document before the Sub-Registrar after the document has been read out to him, then in my opinion it requires strong evidence to justify a Court in holding that the consideration was something different from Rs. 2,000. From the accounts we find that Walve's liability to the plaintiff was reduced by Rs. 2,000 and the defendant's liability to Walve, assuming that it existed, was reduced by Rs. 2,000, and also the liability of Namdeo to Walve was reduced by the defendant's acceptance of the liability. There is no need to suppose that the accounts are incorrect, and there is evidence to show that at any rate Walve's accounts are regularly maintained. It is not as if those accounts were the only basis of the defendant's liability. He has signed a solemn document in which he makes certain admissions, and I do not know why he should be absolved from liability. I cannot see how it was for the plaintiff to be asked to prove transactions with which he himself had no concern whatever, namely the transactions between the defendant and Namdeo. In my opinion both the lower Courts have erred in treating this question of consideration as if it were a matter to be proved by the plaintiff and in particular in requiring the plaintiff to go into the details of transactions with which he himself had no concern. I think therefore that their findings of facts are vitiated by an error of law which is serious enough to justify me in interfering.

I allow the appeal and direct a decree to issue for the amount claimed by the plaintiff with costs throughout. I leave discretion to the trial Court to pass any orders under S. 15-B, Dekkhan Agriculturists' Relief Act, in connexion with this decree that it thinks just as to future interest, instalments, and the method of recovery in the event of non-payment.

D.S./R.K. *Appeal allowed.*

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MACKLIN, J.

Vinayak Yeshwant Prabhu Desai—Plaintiff—Appellant.

v.

Ghanashyam Vithal Tirwadkar and *another*—Defendants—Respondents.

Second Appeal No. 433 of 1932, Decided on 14th January 1936, from decision of First Class Sub-Judge, Ratnagiri, in Appeals Nos. 223 and 224 of 1930.

(a) Bombay Khoti Settlement Act (1 of 1880), S. 10—Razinama for consideration of undertaking is not relinquishment within meaning of S. 10, but is sale.

A razinama executed by an occupant of khoti land for consideration of an undertaking that the land in the holding should be relieved from forfeiture for non-payment of arrears of rent, is not a relinquishment within the meaning of S. 10 but is a sale and therefore not valid as relinquishment. [P 288 C 1]

(b) Bombay Khoti Settlement Act (1 of 1880), S. 9—Deed of sale—Consent given by managing khot not as managing khot but in his individual capacity is not valid consent under S. 9.

A managing khot is entitled to give consent to a transfer by way of sale of a holding. But for the managing khot to give a valid consent on behalf of the khots within the meaning of S. 9, the consent must be given by him as managing khot and not in his individual capacity. Hence consent to a deed of sale given by a managing khot in his individual capacity is not a valid consent within the meaning of S. 9. [P 288 C 2]

G. B. Chitale—for Appellant.

A. G. Desai and *T. N. Walavalkar* —for Respondents Nos. 1 and 2.

Judgment.—The plaintiffs in this case have sued for possession of the property in suit and for minor reliefs on the strength of a so-called razinama executed by defendant 1 in favour of plaintiff 1 in May 1917. Plaintiff 1 at the time of the execution of this deed was the managing khot of a share of a certain village, and

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defendant 1 was one of the occupants. It appears that defendant 1 was heavily in arrears with his rent and that he executed the deed in question to relieve himself from further liability. The plaintiffs have now sued him on the strength of that deed, but are met by the contentions (1) that the deed is invalid as a razinama, not being made with the consent of the managing khot or the body of khots as required by S. 10, Khoti Settlement Act, (2) that in any event the document cannot be binding upon the share of defendant 2, who was separated from defendant 1 and (3) that the suit is barred by O. 2, R. 2, Civil P. C. The trial Court gave the plaintiffs a decree and held defendant 2 liable to the plaintiffs' claim along with defendant 1. On appeal this decision was reversed and the suit was dismissed on the ground that the document sued upon was not a razinama, being for consideration, and therefore could not be validated by S. 10 of the Act; that even regarded as a razinama it was invalid, because in the circumstances of the case it was not open to the managing khot to give his consent; that defendant 2 was separated from defendant 1 and was not, therefore, liable to the plaintiffs' claim; and that the suit was barred by the provisions of O. 2, R. 2. Plaintiff 1 now comes in second appeal upon the same contentions as were raised in the lower Courts and with an additional contention that even if the document sued upon is not a razinama by reason of its being for consideration, still it can be regarded as a sale and one which was validated under S. 9 of the Act by the consent of the managing khot.

It is found as a fact by the lower appellate Court that, although the document expressly states that it was without consideration, still there was a real consideration for the document in an undertaking that the land in the holding of defendants 1 and 2 (which, I may mention, considerably exceeded the actual land relinquished under the deed) should be relieved from forfeiture for non-payment of arrears of rent. That, in my opinion, is good consideration, and I agree with the lower appellate Court in thinking that it takes the transaction out of the category of relinquishments within the meaning of S. 10 of the Act and makes it a sale. Thus any considerations as to the validity of the deed regarded as a relinquishment can no longer be considered, and the question is whether it is valid as a deed of sale. If it is to be valid as a deed of sale, it is valid only by reason of S. 9 of the Act; and under that section it cannot be valid unless it has received the consent of the managing khot. The section itself says "the khot," which means the body of khots where there are more than one. But it has been held in 26 Bom L R 421 (1) that under S. 9 of the Act the managing khot is entitled to give consent to the transfer of a permanent tenancy; and I take it that the managing khot is equally entitled to give consent to a transfer by way of sale of a holding. But for the managing khot to give a valid consent on behalf of the khots within the meaning of S. 9 as interpreted in 26 Bom L R 421 (1), it is clear that the consent must be given by him as managing khot and not in his individual capacity. Here we have a deed which is to all intents and purposes executed by a person who indeed happens to be the managing khot but acts in his personal capacity; and this consideration applies also to any consent he may be presumed to have given from the fact of his being a party to the deed. I am asked to assume that because he was the managing khot and as managing khot must have known of the transaction, therefore the transaction received his consent as managing khot. But I am unable to assume anything of the sort. There is nothing either in the transaction itself or in the subsequent history of the parties to suggest that the managing khot as such was in any way concerned. Thus the transaction is invalid under S. 9 as a sale. I may mention that the same considerations as to the necessity of the consent of the managing khot as such would apply even to a relinquishment under S. 10. That being so, it is not necessary for me to consider the applicability of O. 2, R. 2, or the liability of defendant 2, since the suit must be dismissed as a whole in any event.

Defendant 1 put in cross-objections to the order of costs, but they were not pressed. Both the appeal and the cross-objections are dismissed with costs in two sets.

D.S./R.K. *Appeal dismissed.*

1. Ibrahim v. Krishnaji, 1924 Bom 459=80 I C 458=26 Bom L R 421.

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MACKLIN, J.

Basawanewa Balappa—Defendant 1—Appellant.

v.

Balappa Shivappa — Plaintiff — Respondent.

Second Appeal No. 755 of 1931, Decided on 16th December 1935, from decision of Dist. Judge, Belgaum, in Appeal No. 94 of 1930.

Limitation Act (1908), S. 23, Art. 120—Refusal of wife to live with her husband is continuing wrong within S. 23—Suit for restitution of conjugal rights within six years of the first refusal is in time under Art. 120.

Refusal of a wife to live with her husband is a 'continuing wrong' within S 23. Hence a suit by a husband for the restitution of conjugal rights brought within six years of the first refusal of the wife to return is within time under Art. 120 : 16 *Bom* 714 and 25 *Bom* 644, *Rel. on.* [P 290 C 2]

S. A. Desai, G. R. Madbhavi and *A. G. Desai*—for Appellant.

A. G. Mulgaonkar and *U. S. Hattiangadi* for *G. S. Mulgaokar*—for Respondent.

Judgment.—The plaintiff in this case sued for restitution of conjugal rights and made his wife defendant 1 and her mother defendant 2. He alleged that he had been married to her for many years and that she had borne him five children, but was now living with another man by name Bhimappa and refused to return to him. The wife contended that she had been divorced by her husband many years ago and since then she married Bhimappa and had borne him four children. The trial Judge held that the divorce was proved and that, therefore, the plaintiff could not bring this suit. In appeal the District Judge held that there was no custom of divorce proved among Jains, to which caste the parties belonged, that the fact of this particular divorce was not proved, and that the plaintiff must, therefore, get a decree. The defendant comes in second appeal.

It is contended as a point of law that the learned District Judge has overlooked certain important evidence in the case and that that evidence, taken in conjunction with the evidence which the District Judge has not ignored, proves that the divorce took place. The defendant alleged the existence of a deed of divorce which she said had been given by the plaintiff to her cousin and had been then given by her cousin to her present husband. That deed is said to be lost. The learned District Judge says that there is no evidence apart from the alleged existence of a lost deed of divorce to substantiate the allegation of the divorce having taken place. In addition to that evidence there is some circumstantial evidence, namely, the undoubted fact that the defendant and her present husband did go through a form of marriage, that they are recognized as married by their neighbours, that the children born during the continuance of that marriage are recognized as the children of that marriage, and that the names of those children have been entered in the birth register as the children of the defendant's present husband. It is suggested that the learned District Judge has ignored this evidence. In my opinion, he has not ignored it. He refers to it but says that although there is normally a presumption that a marriage ceremony is valid, that presumption cannot exist in a case like the present, where there has admittedly been a former marriage, where the husband of the former marriage is alive, and where that husband still claims the defendant to be his wife. In other words the learned Judge holds that the existence of a second marriage does not prove that a divorce took place. I entirely agree. We have the fact that a second marriage took place; but even if we assume that the defendant is telling the truth when she says that her last four children are the children of her second husband, and even if we assume that there really was a deed of divorce, I still do not think that that is enough to prove that there was an actual divorce. It is not as if divorces were recognized by the Hindu law in general. Even assuming that divorce is recognized by the Jain caste, which in fact the learned District Judge held to be not proved, still it is a matter outside the ordinary Hindu custom, and one would expect better evidence of it than a mere allegation of the existence of a deed of divorce which has now been lost. No one speaks to any ceremony of divorce, and no one speaks to any deed or words of the divorcing husband apart from his having handed a deed of divorce to his wife's cousin.

But upon the written statement in this case a question of limitation would arise, and it is necessary to consider whether

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the suit was in time. The article applicable is Art. 120, providing a period of six years from the time when the right to sue accrued. If the defendant is telling the truth when she says that she has been married to her present husband for nine or ten years and has borne him four children, then the suit is out of time unless it can be brought in time by some exemption provided by the Act. It is argued that such an exemption is to be found in S. 23, which provides for a fresh period of limitation arising at every moment of the time during which a continuing wrong continues. The question then is whether a refusal of a wife to live with her husband is a continuing wrong. There is no authority upon the point that I have been able to discover since the present Limitation Act came into force in 1908. Under the old Act suits for restitution of conjugal rights were governed by Art. 35 of that Act, which provided a period of two years from the date of demand and refusal.

In 16 Bom 714 (1), it was held that S. 23 applied to suits for the restitution of conjugal rights although such suits were governed by Art. 35. In 23 Bom 307 (2), their Lordships refused to express any opinion as to the applicability of S. 23 to such suits, evidently considering that the matter had not been authoritatively decided and that it was a difficult question. In 25 Bom 644 (3), the point was finally set at rest so far as the then existing Act was concerned. It was there held by a Full Bench that having regard to S. 23, Limitation Act of 1877 and Art. 35 of that Act a suit under the Parsi Marriage and Divorce Act, for the restitution of conjugal rights would be barred within two years of demand and refusal. That was a case in which the question was with special reference to the Parsi Marriage and Divorce Act ; but the principle underlying the decision is, I think, applicable not only to the old Act of 1877 but is also applicable generally and not only to Parsi marriages. The reasoning of the learned Chief Justice was based upon the wording of Art. 35 as it stood, and he held that S. 23 of the Act, being only general in its terms and Art. 35 being particular in its terms, if there were any repugnancy between the section and the article, then the particular provision would have to prevail and the period for a suit for restitution would be two years from the date of demand and refusal in spite of S. 23. All the authorities have assumed that the continuing wrong referred to in S. 23 would include failure of a wife to return to her husband, and the only reason why the Full Bench held that Art. 35, as it then was, prevailed over S. 23 was that Art. 35 dealt with a particular instance of a wrong, while S. 23 dealt with continuing wrongs only generally. But Art. 35 is no longer part of the law and its place has been taken by Art. 120, which provides a period of six years from the time when the plaintiff's right to sue accrued. That is itself an article of general rather than particular application and cannot be held to override a section of the Act merely because the section is in general terms. Moreover in the present case there is evidence to show that the first actual refusal took place within six years of the suit, and a statement to that effect was made in the plaint and was not denied in the written statement. On both grounds, therefore, the suit is in time. The decree of the lower appellate Court must be upheld, and this appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

1. Bai Sari v. Sankla Hirachand, (1892) 16 Bom 714.
2. Fakirgauda v. Gangi, (1898) 23 Bom 307.
3. Dhanjibhoy Bomanji v. Hirabai, (1901) 25 Bom 644=3 Bom L R 371 (F B).

* A. I. R. 1936 Bombay 290

BROOMFIELD AND TYABJI, JJ.

Dnyaneshwar Krishna Sambhus—Appellant.

v.

Anant Vasudeo Avachat—Respondent 1.

First Appeal No. 225 of 1929, Decided on 15th January 1936, against decision of Addl. 1st Class Sub-Judge, Poona, in Suit No. 915 of 1927.

(a) Dekkhan Agriculturists' Relief Act (17 of 1879), S. 63-A, Cl. 2—Sale-deed required to be registered not registered—It may explain nature of vendee's possession or be useful for other collateral purpose.

A sale-deed required to be registered under S. 63-A, when not registered, is not admissible as evidence of title, but may be looked at to explain the nature of the possession of the vendee obtained in consequence of it, or for any other collateral purpose, but it cannot be acted upon to validate it as a conveyance. [P 292 C 1]

*** (b) Hindu Law—Partition—Family consisting of adult member and minor co-parce-**

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ner—Mere intention of adult member to separate is sufficient to bring about disruption.

Neither an agreement between all the coparceners of a Hindu joint family nor the actual division and distribution of property is essential to the disruption of the joint status. Hence where a joint family consists of a minor member and an adult member, the conduct and declaration of an adult co-parcener are sufficient to put an end to the co-parcenary and sever his joint relationship even with the minor co-parcener: 1916 *P C* 104; 1917 *P C* 39 and 1931 *P C* 154, *Rel. on.* [P 294 C 2]

G. N. Thakor and *D. A. Tulzapurkar*—for Appellant.

S. G. Patwardhan—for Respondent 1.

Broomfield, J.—This is an appeal from a decree of the 1st Class Subordinate Judge, Poona, allowing the plaintiff's suit for a declaration, injunction and the possession of certain property. The material facts are as follows: One Bhau Mahadev, a resident of Ale, Junnar taluka, had altogether nine sons and seven daughters; but the sons had all died by 1902; the last two remaining sons Trimbak and Atmaram died in that year. Defendant 13 is Trimbak's widow and defendant 12 is Atmaram's widow. Trimbak had a son Vishnu, who died of plague in 1917 leaving a widow Gitabai, who is defendant 14. Gitabai was pregnant at the time of her husband's death, but this fact was not known. On 19th January 1918, Bhau made a will by which he bequeathed all his property to Anant, the plaintiff, who is the son of Bhau's daughter Mankarnika. On 8th June 1918, Gitabai gave birth to a posthumous son Dnyneshwar, who is defendant 1. As the birth of this son made the will inoperative, Bhau, on 22nd July 1918, executed a sale-deed in favour of the plaintiff by which he purported to convey to him his one half share in the joint family property belonging to himself and the minor defendant 1. On 4th March 1919 Bhau caused to be executed a partition-deed by which the property was divided in two equal shares between the plaintiff and the minor. In the same year, Atmaram's widow Savitribai brought a suit against Bhau, the minor, and the plaintiff for maintenance, and obtained a decree by which her maintenance was charged on the whole of the property. In 1920 Bhau filed a suit, No. 421 of 1920, against defendant 1, who was represented by his maternal grandfather Gangadhar, to obtain a declaration that the partition effected on 4th March 1919 was a valid transaction and not prejudicial to the interest of the minor defendant.

At the same time Anant, the present plaintiff, filed a suit, No. 422 of 1920, for a similar declaration and, if necessary, for a fresh partition. The defendants were Bhau and the minor defendant 1. It may be noted, though the point is not now material, that Bhau's suit was dismissed on the ground that it was not maintainable under S. 42, Specific Relief Act, and Anant's plaint was returned on the ground that the Court had no pecuniary jurisdiction to entertain it. On 5th September 1920, Bhau made a second will by which he bequeathed all his property to the plaintiff. Probate of this will was obtained in due course, but as the plaintiff's claim to the property was resisted, he had to bring the present suit in which he claims the following relief: A declaration that the sale-deed of 22nd July 1918, and the partition-deed of 4th March 1919, are legal and the plaintiff became the owner of the property conveyed to him thereby; a permanent injunction restraining the defendants from obstructing the plaintiff in the enjoyment of the property in his possession; possession of certain properties now occupied by the defendants; a half share of moveable property specified in the plaint; and lastly, in the alternative, partition and possession of his one-half share in the properties in suit under the will of Bhau dated 5th September 1920. It has been held by the trial Court that the sale-deed (Ex. 114) required to be registered under S. 63-A, Dekkhan Agriculturists' Relief Act, and, not having been so registered, is not admissible as evidence of title. It has been held admissible however to prove the nature of the plaintiff's possession of the property, and in view of the fact that the plaintiff obtained possession in accordance with the sale-deed, the transaction has been held valid on the principle of "part performance."

The partition deed has also been held to be legal and valid as having been effected by the managing member of a joint family. Incidentally I may mention that the learned trial Judge finds that there was good consideration for the sale-deed and that there is no substance in the allegations made by the defendants that Bhau was induced to execute it by undue influence or misrepresentation. It has also been held that from the time of the partition-deed Bhau became separate

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from the minor defendant 1 and therefore, apart from the sale-deed and partition-deed, he was competent to devise his separate share to the plaintiff by his will. The learned counsel for the appellant has challenged all the findings of the trial Court, except the finding as to undue influence, misrepresentation, etc., and the finding that certain observations in the judgment in Savitribai's maintenance suit as to the nature of the sale-deed are not res judicata. It is clear that the appellant's case as to undue influence is no longer maintainable in view of the judgment in the probate proceedings, and there can be no question of res judicata in respect of the maintenance suit because that was tried by a 2nd Class Subordinate Judge.

I propose to deal first with the question of the effect of the sale-deed (Ex. 114). The trial Judge, I think, is clearly right in saying that in spite of the fact that it was not duly registered, this deed may be looked at to explain the nature of the possession of the plaintiff obtained in consequence of it, or for any other collateral purpose; but I cannot agree with the learned Judge that the fact that it was acted upon in this way avails to validate it as a conveyance. It is difficult to see how the doctrine of "part performance," on which the learned Judge relies, could in any way affect defendant who was not a party to the transaction and does not claim under either party to it. By birth he became joint owner with Bhau, but he does not claim under him. Apart from that however the view that the English equitable doctrine of "part performance" can be invoked so as to circumvent the Indian law of registration has been exploded by the Judges of the Privy Council in 58 I A 91 (1), 60 I A 297 (2) and 61 I A 388 (3). The case of the partition is somewhat more difficult. When Bhau referred to this transaction subsequently, he spoke of it as though it was a partition effected by himself in his capacity as manager of the joint family. Thus, in Ex. 109, which is his written statement in the suit filed by the plaintiff in 1920, he says:

In order that there should arise no dispute or difficulty hereafter between the plaintiff and defendant 2 (i e., the present defendant 1) and because in my capacity as the eldest member of the joint family I have a right to make a partition, and also as a coparcener in the joint family I have made in respect of the said joint family property, a proper partition of the share of the minor defendant 2, on 4th March 1919, ... I have at the same time given separate possession of his share to the plaintiff; and the share of the minor defendant 2 has separately remained in my possession as belonging to defendant 2.

And in the will (Ex. 86) he says this :

My chief intention in making the partition was that my joint relationship which existed under the Hindu law with Dnyaneshwar should be dissolved and that each of us should be the full owner of his own respective share, and should independently enjoy his own share. I made the partition-deed with this object in view and have divided the property into separate portions.

The learned trial Judge appears to have taken the same view of the transaction, but actually Bhau was not a party to the deed either as manager or otherwise : the only parties were defendant 1 represented by Bhau as his guardian and the plaintiff. The property was divided between them and the share which on a partition should have come to Bhau was assigned to the plaintiff on the footing that he had already become owner of it under the sale-deed. I think, therefore, that Mr. Thakor is probably right in his contention that this deed must be regarded as a mere corollary to the sale-deed, and if, as we hold, the sale-deed confers no title on the plaintiff neither does the partition deed. In that view of the case the plaintiff's claim could only be based on the will, and he can claim under the will only if the testator had ceased to be a member of a joint family and acquired a separate interest in the property. The most important question, therefore, in the appeal is whether the trial Judge is right in his finding that Bhau ceased to be joint with defendant 1 from the date of the partition-deed. Let us look at the evidence on this issue. Although the partition-deed is ineffective as a conveyance to the plaintiff, the transaction is, in my opinion, very good evidence of Bhau's desire and intention of putting an end to the joint family. After all, although he was not formally a party to the deed, it was to all intents and purposes his transaction and not that of defendant 1. The most important recital in the deed is this :

1. Ariff v. Jadunath Majumdar, 1931 P C 79=131 I C 762=58 I A 91=58 Cal 1235 (P C).
2. Currimbhoy & Co. v. Creete, 1933 P C 29=141 I C 209=60 I A 297=60 Cal 980 (P C).
3. Pir Bakhsh v. Mahomed Tahar, 1934 P C 235=151 I C 326=61 I A 388=58 Bom 650 (P C).

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Out of the whole property, as stated above, Bhau Mahadeo Sambhus, the guardian of the minor, sold the half share which was his own to Anant on 22nd July 1918. At the time of the sale-deed it was settled that the enjoyment of the property sold by the deed should go on in a joint manner. But as a desire was expressed by Anant, the purchaser, that the property sold should be separated by a partition, and that the half share so purchased should be made available for separate enjoyment, and as it seems probable that dispute would arise because of the difficulties that might crop up in connexion with the joint enjoyment of the whole property, so the half share which has, as between the parties themselves been completely separated from the property described above, is as under.

The deed goes on to provide that the enjoyment of each of the two half shares should be by each party by himself and neither should obstruct the enjoyment of the other of his share. The plaintiff was put in actual possession of his share, and Bhau, as it appears, remained in management of the other half on behalf of the minor defendant 1. It is difficult to argue that the joint family subsisted, and indeed, the whole course of Bhau's conduct from that day to the day of his death is, in my opinion, irreconcilable with such a view. Bhau was examined as a witness in Savitribai's suit on two occasions. In his first statement, which is Ex. 107, he merely referred to the sale-deed and the partition deed. But in his second statement, Ex. 108, he said :

Dnyaneshwar has got one-half share in our estate. . . . .I have sold to him my half share. The shares are separated into distinct portions.

These statements are not really consistent with the joint estate of Bhau and defendant 1. In the plaint of the suit which Bhau filed in 1920 for a declaration that the partition of 4th March 1919 was a valid transaction, he alleged that he and defendant 1 had been the owners of certain properties as members of a joint Hindu family, and he had sold his half share in that property to Anant and he had made a division of the property by metes and bounds and given possession to Anant and passed a partition-deed. The suit was filed for the purpose of obtaining the Court's sanction to these transactions, and it is not consistent with the view that Bhau considered himself to be still joint with defendant 1. I have already referred to Bhau's written statement in the suit filed by Anant (Ex. 109). Then, in addition, there are the following significant recitals in the will. After the passage referring to the partition, which I have already quoted, the testator says :

It is my opinion that the said partition-deed is proper and sufficient from a legal point of view. But if possibly there has remained some flaw from a legal standpoint in the sale-deed passed by me on 22nd July 1918, previous to the partition, I declare hereby that I had and have dissolved my joint relationship with Dnyaneshwar; and that the partition of the property which has been effected by the said partition-deed is very proper and hence effect should be given to it accordingly.

Further on he says :

I hereby declare my will as follows : that my daughter's son Anant Wasudeo Avachat should receive after my death all the property assigned to my share as also whatever property I may leave behind me. He is full owner of my property after me and he should enjoy it as the full owner of it.

This conduct and these declarations of Bhau are in my opinion not capable of any other construction but that as from the date of the partition-deed he desired and intended to put an end to the coparcenary and sever his joint relationship with defendant 1. He took every step he could think of to make that position clear. No doubt, as the learned counsel for the appellant says, he believed the sale-deed and the partition-deed to be valid. But the partition-deed, whether valid or not as a conveyance, was in any case an outward and visible sign of his own separation from defendant 1. It is perfectly clear that he never resiled from the position which he took up at that time. The question then arises whether this was enough to effect a legal dissolution of the joint family. The law on this point has been summarised in Mulla's "Principles of Hindu Law," Edn. 8, para. 325 :

Partition is a severance of joint status, and as such it is a matter of individual volition. All that is necessary, therefore, to constitute a partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. It is immaterial, in such a case, whether the other members assent. Once a member of a joint family has clearly and unequivocally intimated to the other members his desire to sever himself from the joint family, his right to obtain and possess his share is unimpeachable whether or not they agree to a separation, and there is an immediate severance of the joint status. The intention to separate may be evinced in different ways, either by explict declaration or by conduct. It may be expressed by serving a notice on the other coparceners. The notice, however, may be withdrawn with the consent of the other coparceners. It may also be expressed by the institution of a suit for partition.

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The leading cases on the point are: 43 I A 151 (4), 44 I A 159 (5) and 58 I A 220 (6). Mr. Thakor of course does not dispute the correctness of these principles. He contends, however, that they should be limited in their operation to adult coparceners, and that a declaration of intention to separate will not be effective by itself as against a minor coparcener. In my opinion this view cannot be accepted. The learned counsel has relied on those passages in the judgments in 43 I A 151 (4) and 58 I A 220 (6) where communication of the intention to separate to the other co-sharers is mentioned. He also relies on cases such as 42 All 461 (7) and 52 Mad 845 (8), where it has been held that the institution of a suit for a partition by a minor will not effect a severance of the joint status unless sanctioned by a decree. When the judgments of the Privy Council are read as a whole, it may well be doubted, I think, whether their Lordships intended to make it an essential condition that the declaration of intention to separate should be formally notified to every member of the family. No doubt the intention must be published in some way. An act of volition which is kept secret could not be legally effective. There would indeed be no evidence in that case that it was genuine. But no formal declaration or notice is required. The intention may be evinced by conduct as held in 43 I A 151 (4), at p. 162, where reference is made to the case in 5 I A 228 (9). I do not think that anything more is essential than publication in the manner appropriate to the circumstances of the case. Defendant 1 was not unrepresented. Besides Bhau, he had his mother and maternal grandfather; and it cannot be supposed that they were ignorant of the position taken up by Bhau. Defendant 1 was himself a party properly represented in all the litigation to which I have referred and in which that position was made clear. It does not appear that there were any minors in 43 I A 151 (4), but there is a reference to minors at p. 159 of the report, which seems to indicate the view their Lordships would take on the point:

> So far as their Lordships are aware, nowhere in the Mitakshara is it stated that agreement between all the coparceners is essential to the disruption of the joint status or that the severance of right can only be brought about by the actual division and distribution of the property held jointly. If this were so and there were minors in a joint undivided family, partition would be impossible until they had all attained majority, a position which is expressly combated and negatived in the Viromitrodaya. (Ch. ii, S. 23.)

Besides, the existence of minor coparceners is such a very common incident of a Hindu joint family that their Lordships could hardly have failed to mention a qualification which, if it existed, would limit the operation of the rule in question to such a material extent. As to the cases in which it has been held that a minor's suit for partition is not effective as a declaration of intention without a decree, it may be noted that the Patna High Court has taken a different view in 4 P L J 38 (10). There appears to be no Bombay case on the point. But assuming that the Allahabad and Madras cases are correctly decided, they have, in my opinion, no material bearing on the point at issue. Ex hypothesi there must be an act of volition on the part of the separating coparcener, and in the case of a minor's suit the act of volition is probably not his but his guardian's or next friend's. But no act of volition or consent is required in the case of any other coparcener. I hold, therefore, that the fact that some of them are minors, and even the fact that the only other coparcener is a minor, will not deprive an adult coparcener of his right to separate if he chooses.

The trial Judge, therefore, was right in holding that Bhau had become separate from defendant 1 as from the date of the partition deed and remained separate till the end. That being so on the footing that the sale and partition deeds were invalid, Bhau became owner of a separate half share which he was competent to devise to the plaintiff. We are satisfied

4. Girja Bai v. Sadashiv Dhundiraj, 1916 P C 104=37 I C 321=43 I A 151=43 Cal 1031=12 N L R 113 (P C).
5. Kawal Nain v. Budh Singh, 1917 P C 39=40 I C 286=44 I A 159=39 All 496 (P C).
6. Bal Krishna v. Ram Krishna, 1931 P C 154=132 I C 733=58 I A 220=53 All 300 (P C).
7. Lalta Prasad v. Sri Mahadeoji Birajman Temple, 1920 All 116=58 I C 667=42 All 461=18 A L J 503 (F B).
8. Ganapathy v. Subramanyam Chetty, 1929 Mad 738=122 I C 167=52 Mad 845=57 M L J 374.
9. Joy Narain Giri v. Grish Chunder Myti, (1878) 4 Cal 434=5 I A 228=3 Sar 871 (P C).
10. Krishna Lal Jha v. Nandeshwar Jha, 1918 Pat 91=44 I C 146=4 P L J 38.

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that the terms of the will are sufficient to confer this interest upon the plaintiff who is therefore entitled to succeed to Bhau's half share of the estate. Strictly speaking as a matter of form it would be necessary to direct a fresh partition to be made now. The learned trial Judge has considered that aspect of the case. He says:

> Then the question is whether there should be again a partition of the lands and houses even if it is held that the partition and the sale deed are void. It would be a mere waste of money and time to make separate divisions of the shares again, when we have in this case already a separation of the shares made by Bhau. As already stated, there is no allegation nor is it proved that the divisions are unequal or detrimental to the interest of the minor. Under these circumstances, it would be a question whether an actual partition by metes and bounds of the lands and houses should be made again or not.

It was not necessary to determine the point in the lower Court, because the learned Judge was of opinion that the plaintiff derived title to the property under the sale deed and the partition deed. As we have taken a different view on that point and hold that the plaintiff can only claim under the will, defendant 1 would strictly be entitled to claim a fresh partition. But the considerations mentioned by the learned trial Judge still remain. It would apparently be an unreasonable waste of time and money to re-open the partition. There would probably be difficulties of various kinds in view of what has happened in the past. Mr. Thakor himself, after consulting his client, has intimated that he does not press for a fresh partition. That being so, the orders passed by the trial Court will stand, and the appeal will be dismissed with costs.

Tyabji, J.—I agree. The effect that the presence of a minor coparcener has on the doctrine of severance of the joint interest in coparcenary property by a declaration showing an unequivocal intention to put an end to the joint estate, has been much discussed before us. Such a declaration may be made by a plaint in a suit for partition ; or, to use the words of Sir Grimwood Mears, C. J., the institution of a suit for partition (by a person sui juris) is such a clear and unequivocal expression of determination that that in itself is sufficient to cause a severance of the joint family : 42 All 461 (7). The Chief Justice distinguished the cases between (1) a suit for partition brought on behalf of a minor and (2) such a suit brought by an adult. The distinction is based on the ground that an adult coparcener has plenary powers, by his own volition, to bring about a severance of his own joint interest, but that the next friend of a minor has not the same plenary power, by his own volition, to bring about a severance of the interest of the minor in coparcenary property. When a plaint is filed in a suit for partition by a next friend on behalf of a minor, the Court exercises a discretion whether in the circumstances it is for the benefit of the minor that a severance of his interest should be caused : in other words, where the guardian of a minor expresses the intention to sever a minor's interest by filing a plaint on the minor's behalf, the expression of intention may not be effective if a severance would be detrimental to the interests of the minor : 52 Mad 845 (8). On the other hand, in a case where the severance was for the benefit of the minor, it was stated that no argument had been adduced in support of the contention, nor any authorities referred to in favour of the " proposition that under Hindu law a minor cannot express either himself or through his guardian an intention to do that which is clearly not against his own interest": 4 P L J 38 (10).

But in all these cases the volition in question was the volition of the person who attempted to set the law into motion with the object of bringing about a severance. It is obvious that where a person attempts to bring about a particular result by making a particular declaration, unless the declarant has plenary authority to bring about the result by his own volition, his declaration may not be effective. This is merely stating the same proposition twice over in different words, and placing the two statements in a sequence that would be appropriate if one form of the statement were a necessary condition for the other. But the position contemplated in this duplicated statement is not what we are concerned with in the present case. For here we are concerned not with the person who takes action, not with the person who is desirous of bringing about a severance or who attempts to do so. The person with whom we are concerned plays a mere passive part. He is one who being sui juris or a minor is irrelevant to the competence of the per-

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son who is making the declaration with the object of bringing about a severance. Where such a declaration is being made, the coparceners other than the declarant himself are merely passive, in the sense that their assent to the declaration is not required, and no action on their part is needed, to give effect to the declaration. The declaration may no doubt take such a form that communication to the other coparceners is necessary for making it final and effective ; but in that case the necessity for the communication is referable to the completion of the declaration itself,—to the exercise of the power inherent in the declarant. It has not been suggested in any judicial pronouncement cited to us—I have already referred to some of them, 43 I A 151 (4), 44 I A 159 (5) and 58 I A 220 (6) were also cited, —that the existence of a minor must of itself deleteriously affect the competence of the major coparceners to sever their own interests from that of the minor, or to render their declarations nugatory, and yet that is the real effect of the appellant's argument in the present case. It is not suggested that there has been in the case before us any breach of a duty owed to the minor, by a person standing in any fiduciary or quasi fiduciary relation to the minor.

R.W./R.K. *Appeal dismissed.*

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* A. I. R. 1936 Bombay 296

KANIA, J.

In re *Fazalbhai Mills, Ltd. (In liquidation).*

I. C. No. 33 of 1933, Decided on 7th February 1936.

*** Trust—Creation of—Fiduciary relationship may be created without use of word "trust"—Person may become trustee by his own acts—Mere retention of interest in property by owner would not go against foundation of trust—Provident fund established by company for benefit of employees—Company going in liquidation—Members claiming to be preferential creditors in respect of amount due to them—On construction of rules held that there was fiduciary relationship between company and members—That provident fund account was trust account—Members held to be preferential creditors.**

Fiduciary relationship may be established without the use of the word 'trust.' A person may become a trustee by his own acts and conduct so as to deprive himself of all beneficial ownership of a property and declare that he will hold the same in trust for another. The mere fact that the owner retains an interest in the property would not necessarily go against the foundation of a trust. [P 297 C 1]

A provident fund was established by a company with the object of making provision for the employees and their family on the death of each member or on his leaving service. The company contributed its share equally with the members. The members were all employees of the company and every member drawing a salary of Rs 250 or more per month was obliged to be a member of the fund. One of the rules of the fund provided that although a member forfeited his claim because of certain events, the lapsed amount did not belong to the company but continued to remain as trust property for the benefit of the members. On the company being ordered to be wound up, the members of the provident fund claimed to rank as preferential creditors for the amounts standing to their credit:

Held: on the construction of the rules as a whole, that there was fiduciary relationship between the company and the members of the fund and that the provident fund account was a trust account, and that the members were entitled to rank as preferential creditors: 1924 *Cal* 818; *Gee* v. *Liddell*, (1866) 35 *Beav* 621, *Ref.*; 1932 *Bom* 311, *Disting.* [P 299 C 1, 2]

Jamshed Kanga and *M. C. Setalvad*—for Liquidator.

N. P. Engineer and *Mrs. Tata Lam*—for Claimants 28, 60, 63 and 79.

Murzban J. Mistree—for Claimants 24, 25, 26, 39, 45, 48, 57, 61, 64, 76, 78 and 80.

A. A. Peerbhoy—for Claimants 2 to 6, 9, 11 to 13, 16, 21, 22, 34, 46, 47, 50, 53, 58, 59, 66 and 68.

N. H. Jhabwala—for Claimants 71, 159, 190 and 191.

Claimants 7, 8, 20, 23, 52, 55, 56, 69 and 70 in person.

Order.—These proceedings arise from the report of the liquidator to settle the list of creditors. In the liquidation proceedings claimants 1 to 80, 189, 190 and 191 claim that, because they were members of the provident fund, founded by the company, they were preferential creditors and entitled to rank as such in the winding up of the company. All these persons were the employees of the company. In the claims filed by them 59 claimed priority from the commitment, two claimed priority subsequently by giving notice, while 22 have not claimed priority in express terms. In my opinion justice requires that the rights of all the parties should however be determined irrespective of this consideration. The first point which arises for consideration is, whether the company was a trustee in respect of the amount standing to the credit of the employees, who were members of the provident fund, or at any rate oc-

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cupied a fiduciary relationship towards them. It is common ground that fiduciary relationship may be established without the use of the word "trust" and that a person may become a trustee by his acts and conduct so as to deprive himself of all beneficial ownership of a property and declare that he will hold the same in trust for another. S. 3, Trusts Act, defines "trust" as follows:

Trust is an obligation annexed to the ownership of property arising out of confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner.

This definition clearly shows that because the owner retains a certain interest in the property it would not necessarily go against the foundation of a trust. This question must be considered with reference to the provident fund rules of the company read as a whole. The rules were framed when the fund was started. After the fund was so started, a subsidiary ledger, as provided by R. 10, was opened in which the amount standing to the credit of each member, consisting of his contribution and the company's contribution, with interest thereon, was credited every year. The amount if any advanced to the member was debited. The total balance of all accounts, entered in the subsidiary ledger, was entered under one item in the general ledger of the company and shown in the balance-sheet under the heading "provident fund deposit." The subsidiary ledger is headed "Deposit Account" and in the company's general ledger also it is described as "the Provident Fund Deposit Balance." The fund was so founded in April 1919, and the object of the fund, as stated in R. 3, was to make provision for the employees and their families on the death of each member or on his leaving service.

In about July 1932, the company came into difficulties, and some members having heard that the directors proposed to close the fund, a petition signed by some members was forwarded to the company. That petition is Ex. B. The signatories thereby informed the directors of the mills that having heard that the company was considering the question of discontinuing or closing the fund they had made the petition. They mentioned that the object of the fund was to make a provision for the members and their family available on the death of each member or on his leaving service and to secure interest at 6 per cent to the members, and to carry out the objects of the fund they made the proposals contained in the petition. The first proposal was that the amount standing to the credit of each member on the date of the closing of the fund should be allowed to remain in deposit with the company as a deposit by such member carrying interest at 6 per cent to be paid at the end of every year. Cls. 2 and 3 suggested that the deposit should continue till the member died or left service and the same should be paid to his heirs or him on the termination of service. This petition was submitted to the directors and considered by them at a meeting held on 15th September 1932. The minutes of that meeting show that the directors did not accept that petition and did not proceed on that footing at all. The directors on the other hand suggested to the agents to frame a scheme under which the provident fund, which was intended to be closed, should be paid off to the members. It appears that thereafter the agents thought out a scheme. (After setting out the resolution embodying the scheme, the judgment proceeded.) After this resolution was so entered in the rough and fair minute books, the agents paid seven instalments and the receipts signed by some members are put in. There is also a specimen entry showing the payment of interest to some members. On 4th September 1933, the directors passed a resolution whereby instead of paying the balance to each of the members by 34 instalments, as provided in the first resolution, they resolved that the balance should be paid by 60 instalments. It is common ground that this was not done at the suggestion or application of any member. The evidence further shows that even before the resolution was passed on 4th September 1933, payment at the reduced instalment was made to some members at the end of August 1933.

The liquidator has considered the first contention of the members as to whether the fund was held by the company in a fiduciary relationship. The learned counsel for the liquidator contended that by reason of R. 21, the company has the first and paramount charge upon the amount from time to time standing to the credit of each member. From that it was sought to be argued that the amount standing to the credit of the member was the mem-

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ber's property, otherwise it would be meaningless to contend that the company had a charge on the same. In my opinion that contention is not correct, because the fact that the company was to get a charge under certain circumstances on this amount is inconsistent with the position that the money belonged to the company, as it would, if it was an ordinary deposit by a depositor with the company. In the same way the provision contained in R. 23 provided that in certain circumstances the contribution of the company shall be refunded to the company. That would be inconsistent with the relationship of debtor and creditor, which would be the position if the creditor had deposited money with the company in the ordinary course. In the same way the contention, that the directors were given absolute discretion for payment on retirement in cases governed by R. 16 (b), and the provision in Cl. (c). of R. 16, go against the existence of fiduciary relationship, is not correct, because all the rules have to be read as a whole. I should point out in particular R. 16 (c), under which the lapsed amounts, which were not paid to members because of their gross misconduct or fraud or other reasons, mentioned in the preceding part of that rule, enured for the benefit of the other members. That clause in particular indicates that although the member forfeited his interest, because of certain events, the lapsed amounts did not belong to the company, but continued to remain as trust property for the benefit of the other members. The decision in 28 C W N 721 (1) mentioned by the liquidator in his report, was attempted to be distinguished on the ground that no words indicating that the fund was to revert to the company under certain contingencies, as found in the Calcutta decision, existed here. As I have pointed out R. 23 contains the words "shall be refunded" to the company. That, in my opinion, is substantially the same as the meaning attached to the words "revert to the company" in the Calcutta decision.

It was next pointed out on behalf of the liquidator that the payment of interest and the fact that in the interval the fund was intended to be used by the company indicate that there was no fiduciary relationship but that the company stood in the position of a debtor only. In support of that contention reliance was placed on the decision in 34 Bom L R 728 (2). The question in that case was about the deposit made by the selling agents of a mill as security for the due discharge of the terms of the agency agreement. The company bound itself to pay interest on the amount deposited, and agreed to invest the amount in Government securities and keep the securities earmarked to the satisfaction of the agents, if the company issued debentures or mortgaged its immoveable properties. The latter contingencies did not happen. The company then went into liquidation, and in the liquidation proceedings the selling agents claimed that there was a fiduciary relationship between the parties in respect of the deposit and, therefore, claimed to rank as preferential creditors. The Court negatived the contention. In the course of his judgment B. J. Wadia, J. observed that the fact that the company was entitled to use the money for its own purpose and pay interest in the meantime were incidents which tended to show that there was a deposit and there was no fiduciary relationship.

It appears from the report that the attention of the learned Judge was not drawn to the decision in 35 Beav 621 (3). In that case there was a provision under which the trustee was permitted to retain the money in his own hands and pay interest at a specified rate to the beneficiary, the trustee presumably being entitled to make such use of the capital or interest as he thought fit. It was not suggested that the provision prevented the transaction from being a trust. Moreover the relationship between the parties in the present case stands altogether on a different footing. The object of the fund, as stated expressly, was to provide an amount when the member either retired from service or died. The company contributed its share equally with the member. The members were again all employees of the mills and every member drawing a salary of Rs. 250 or more per month was obliged to be a member of the fund. 34 Bom L R 728 (2) was an entirely different case where the selling agents had deposited money for the fulfilment of their own obligation under

1. In re Alliance Bank of Simla, Ltd., 1924 Cal 818=84 I C 14=28 C W N 721.

2. In re Maneckji Petit Manufacturing Co., 1932 Bom 311=140 I C 814=34 Bom L R 728.

3. Gee v. Liddell (No. 1), (1866) 35 Beav 621.

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the selling agency agreement. There was no question of contribution by the company and no question of employment, as the term is ordinarily understood between master and servant. I think, therefore, that that decision does not help the liquidator. Having regard to the definition of "trust" in the Indian Trusts Act, I also do not see any reason why there cannot be a trust merely because the company expressly reserved the right to utilise the trust fund for its own purpose and agreed to pay interest in the meanwhile to each member as provided in R. 12. It was next urged on behalf of the liquidator that throughout the rules the fund is described as a deposit and, therefore, it was a deposit and not a trust. As I have pointed out it is not necessary to create fiduciary relations to use the word "trust", and the Court has to look at the rules as a whole to arrive at the correct meaning thereof. The rules describe it a deposit, but it is a provident fund deposit, and therefore, it will not be correct to read the word "deposit" detached from the words " provident fund." The rules have also to be read along with the object for which the fund was made and founded. This argument was similarly rejected in the Calcutta decision mentioned above. In my opinion, therefore, on a true construction of the rules, as a whole, fiduciary relationship between the company and the members of the fund is established and the provident fund deposit account is a trust account.

On that footing it will be on the liquidator to establish that the relationship between the parties was altered by an agreement, express or implied. The first step relied upon by the liquidator in this connexion is that a petition was sent to the directors in which each signatory individually asked the directors to hold the amount standing to his credit as a deposit made by him with the company and on which the company was asked to pay interest at six per cent. It is, therefore, contended that the signing members themselves suggested an alteration of the relationship. In this connexion it should be first noted that claimants Nos. 6, 17, 46, 57, 58, 60 and 63 have not signed the petition. The evidence further shows that the signatures of claimants Nos. 32, 3, 51, 70, 49, 23, 75, 18, 42, 67, 35, 30, 15, 40, 41, 33, 37, 44, 74, 14, 38, 29, 69, 31, 1 and 43 are not proved. It is important also to note at this stage that the signatures of these claimants on the alleged receipts of instalments or interest are equally not proved. Under the circumstances, in respect of these parties, there being no other express agreement, no question of implied agreement by conduct arises. The contention of the liquidator, that these claimants are not entitled to rank as preferential creditors, must, therefore, fail.

As regards the claimants whose signatures are proved or admitted, it is necessary to remember that this petition was submitted to the directors but was rejected. In my opinion, therefore, no effect could legitimately be given to the proposal which suggested that the amount standing to the credit of the signing members should be treated as a deposit by such members. I do not think it is permissible to the liquidator to contend that although the proposal was rejected in toto, he is entitled to rely on this expression of desire of the members in connexion with the subsequent conduct of the members. The directors, having refused to entertain this petition, asked the agents to frame a scheme. The resolution which they ultimately passed on 1st December 1932 was as follows. (After setting out the resolution, the judgment went on.) The directors have themselves thus specified the manner in which this proposal, which was a fresh proposal put forward by them, should be accepted by the members, inasmuch as at the beginning of the resolution they expressly say "Subject to the members of the fund signing their acceptance to the scheme." It is common ground that after the resolution was passed no member had signed his acceptance to the scheme as provided in the resolution. The Indian Companies Act provides that the articles of association govern the relations of the parties and the board of directors and the agents. If therefore this proposal put forward by the directors expressly mentioned that the same, if accepted, should be accepted in a particular manner, I do not see how it will bind the company, in the event of a dispute arising between the parties, if the same was not accepted in that particular manner. In the case of individual contracting parties it may be contended that there was an implied agreement by conduct. In the present case I do not think it is open to the company to con-

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tend that although the acceptance was not signified as mentioned expressly in the resolution, the same should be considered as a complete agreement because it was alleged by them that it was acted upon by the agents and by some members. On that footing, the contention of the liquidator, based on the resolution, must fail.

Even if there were any doubt as to the correctness of this view, the ultimate result is the same. The directors passed a resolution which contained the proposal that the amount standing to the credit of each member should be allowed to remain a deposit with the company by the member carrying interest at six per cent and be paid off as specified therein. The evidence of conduct of both, the company and the members, stands thus: since the fund was started the company had maintained a subsidiary ledger as I have indicated above. The same ledger continued to be maintained without any interruption and without indicating that any alteration in the relations of the parties had taken place. The statement in the balance-sheets continued to be in the same terms. It was admitted by the accountant called on behalf of the liquidator that when loans were given against the provident fund to members before 1932, receipts were taken, and in respect of the loans advanced subsequently, receipts in the same terms were similarly taken. It was further admitted that in respect of the deposits made with the company by individuals the company issued fixed deposit receipts. After the resolution was passed in December 1932, admittedly no such receipts were issued to any member of the provident fund. This is the conduct of the company. As regards members, the only evidence led on behalf of the liquidator is of receipts passed by some members when seven instalments of principal, worked out on the footing that the provident fund was to be repaid in 43 instalments, one of interest for the year ending July 1933, and one altered instalment, were paid.

The liquidator has not suggested, and the evidence of Mr. Ahmed and the accountant called on behalf of the liquidator also do not suggest, that the terms of the resolution were conveyed to individual members, either before or after the instalments were so paid. The terms of the receipt passed by each member only mention that it was an instalment of the provident fund. There is no indication in the wording of this receipt to show that the members received those instalments with the knowledge of the terms of the resolution. Receipts in the same terms would be passed if the directors had intimated to the members that the fund had been closed, but because of financial difficulties the company would not pay the amount forthwith, as they were bound to pay on the closing of the fund, but the same would be paid in instalments, and in the meantime the company will pay interest to each member for the amount standing to his credit. It is important to bear in mind that in that event there would have been no alteration in the original relations between the parties. If so, what more has been established by the liquidator to show that there was an agreement to alter the relations? To my mind, nothing at all. The suggestion of the agreement, so far as the company is concerned, is based only on their acts in paying the instalments as entered in their books. From that the company asks the Court to infer that they paid the instalments in pursuance of the resolution. That is the highest the point could be put and nothing further. The two necessary steps which must occur thereafter to complete the agreement, viz., that the proposal, which in terms intimated that the legal relation between the parties was going to be altered was conveyed to the members, and that it was accepted by them after such knowledge, are wanting in this case. In my opinion therefore the liquidator has failed to establish that there was an alteration in the legal relation between the parties as it originally existed. In respect of the signing members also therefore there being no agreement to alter the relations, the original footing on which the provident fund existed must stand and the members are entitled to rank as preferential creditors.

The evidence of Kale, the Superintendent in the Court Liquidator's Office, shows that sufficient liquid assets were in existence on the date of liquidation, from which the fund could be paid in full with interest up to the date of liquidation. In the winding up of the company, rules prevailing in insolvency govern the rights of the parties according to S. 229, Companies Act, and having regard to the deci-

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sion in 60 I A 203 (4), no question of making a tracing order remains. The liquidator should therefore allow the claims of claimants Nos. 1 to 80, 189, 190 and 191 as preferential creditors, and in the certificate to be issued they should be shown as such. The costs of the claimants appearing before me on the footing of a long cause, except their costs of and in connexion with the allegations of undue influence, coercion and threats of dismissal, be added to their respective claims and be paid by the official liquidator out of the assets of the company in his hands. The costs of the official liquidator, taxed between attorney and client, on a long cause scale, to come out of the assets of the company in his hands. Two counsel allowed to the official liquidator and claimants Nos. 28, 60, 63 and 79.

R.M./R.K. *Order accordingly.*

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4. Official Assignee v. Bhatt, 1933 P C 148 = 143 I C 162=60 I A 203=56 Mad 570 (P C).

A. I. R. 1936 Bombay 301

BROOMFIELD AND N. J. WADIA, JJ.

Basangouda Giriyeppagouda Patil—Plaintiff—Appellant.

v.

Basalingappa Mallangouda Patil and *others*—Defendants—Respondents.

First Appeal No. 304 of 1929, Decided on 27th November 1935, against decision of First Class Sub-Judge, Bijapur, in Suit No. 150 of 1928.

(a) Res judicata—Bar of—Estoppel by res judicata may prevail even when result of giving effect to it is to sanction what is prohibited by law.

The plea of estoppel by res judicata may prevail even when the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute.

Where two persons claim to be the heirs of a deceased holder of a patilaki watan, and one of them obtains a certificate of heirship and gets his name entered in the watan register, and the other sues for a declaration that he is the heir of the deceased holder and the suit ends in a compromise decree, under which the parties are declared entitled to the right of service in equal shares, the consent decree operates as an estoppel until set aside by a proper suit, even though the effect of it might be to sanction the alienation of the watan and the watan rights which is prohibited by S. 5, Hereditary Offices Act; and a person claiming from one of the parties to the compromise decree is bound by the decree which is a judgment inter partes: 33 *Bom* 479 and 35 *Bom* 371, *Rel. on*; 1922 *Bom* 110, *Not foll.* [P 303 C 2; P 304 C 1, 2]

(b) Bombay Revenue Jurisdiction Act (10 of 1876), S. 4—Suit for declaration that defendant is not watandar of village is prima facie barred under S. 4—Civil Court can however grant declaration that plaintiff is nearest heir of deceased holder.

A suit for a declaration that the defendant is not the watandar of a particular village, in which one of the reliefs sought for is that it should be declared that the plaintiff is entitled to have his name entered in the watan (service) register of the village, is prima facie barred under S. 4, Revenue Jurisdiction Act, as the prayer is in effect a claim to perform the duties of patil.

There is, however, nothing in the Act which would bar a civil Court from granting a declaration that the plaintiff is the nearest heir of the deceased-holder in preference to the defendant. The Civil Courts have jurisdiction to decide disputes between persons claiming to be watandars inter se as to their status in the watan family: 1930 *Bom* 254, *Rel. on.* [P 305 C 2; P 306 C 1]

(c) Evidence Act (1872), S. 90—Copy put on record—No presumption can be drawn as to genuineness or due execution of original.

No presumption can be drawn under S. 90 as to the genuineness or due execution of the original a copy of which is put on record and no proof of the original is given: 1935 *P C* 132, *Foll.* [P 306 C 2]

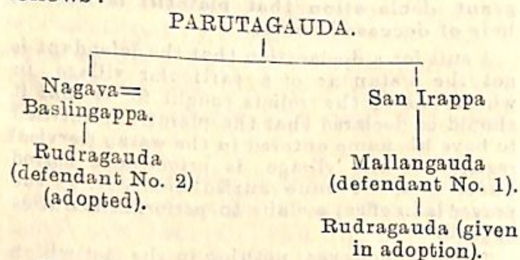
G. N. Thakor, G. R. Madbhavi and *K. G. Datar*—for Appellant.

A G. Desai, G. V. Mokashi and *S. R. Joshi*—for Respondents.

Broomfield, J.—This litigation is concerned with the rights of the parties in the patilki watan of the village Masuti in the Bagewadi taluka of the Bijapur district. The plaintiff, whose suit has been dismissed by the trial Court and who now appeals, is the adopted son of one Giriyeppagauda, and as such claims to be entitled to the right of service as patil, and also to the lands in the possession of the defendants which form part of the watan. The last undisputed holder of the rights and lands in question was Ningangauda, the adopted son of Irappa Ningappa. He died in 1891 leaving no one in that particular branch of the family except a sister Ningava. The parties to the present litigation belong to collateral branches of the family. Their exact relationship to the propositus is a matter of much dispute, but it is common ground that, apart from certain difficulties arising from the fact that Parutagauda, the ancestor of defendants 1 and 2, was given in adoption to another family, their branch, i.e., the branch of defendants 1 and 2, is more closely connected with Ningangauda's branch than that to which Giriyeppa, the

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plaintiff's adopted father, belonged. There is no dispute also as to the immediate pedigree of defendants 1 and 2 which is as follows :



Basalingappa died in 1877 without issue, but his widow Nagava adopted Rudragauda defendant 2, son of Mallangauda, defendant 1, in 1900. It may be mentioned, though it does not affect the case materially, that the propositus Ningangauda was also the natural son of defendant 1 given by him in adoption to Irappa Ningappa and his wife Rudrava in 1887. After Ningangauda's death there was a dispute as to the heirship between Giriyeppa and San Irappa, the father of defendant 1. In Miscellaneous No. 50 of 1891 it was held that Giriyepya was the heir of Ningangauda and he was given a certificate of heirship His name was also entered by the revenue authorities in the watan register. San Irappa then filed a suit, No. 225 of 1893, for a declaration that he was the heir, and for cancellation of the heirship certificate granted to Giriyeppagauda. This suit was dismissed and appeals to the District Court and to the High Court were unsuccessful. The date of the final decree of the High Court was in February 1900. The grounds of the decision against San Irappa in these proceedings were that it was found that Parutagauda had been given in adoption to a different watan family altogether, that of Shirol in the Dharwar District. San Irappa tried by various expedients to get out of this. The adoption was denied, alleged to be invalid and finally alleged to have been in the dwyamushyana form, i. e., with rights in both families. An attempt was also made to show that the Shirol family was connected with the Masuti family, so that even if San Irappa belonged to the former, he might still claim as an heir to the Masuti watan. But all these pleas were negatived. There was no hint so far of the point subsequently raised that San Irappa's brother Basalingappa had been born before Parutagauda's adoption, and therefore had remained in the Masuti family. Then came the adoption of Rudragauda by Baslingappa's widow Nagava on 31st March 1900, and soon after Rudragauda through his maternal uncle Subbangauda as next friend, filed suit No. 943 of 1900 for a declaration that he was Ningangauda's heir. It was not necessary for him to pray for possession of the lands, because it appears that Giriyeppa in spite of his success in the previous litigation had never got possession of any of the lands in dispute. It was alleged in the plaint of that suit that the minor Rudragauda was in possession and that his uncle and next friend was managing on his behalf. In actual fact Mallangauda, defendant 1, appears to have been in possession. He is, as I have said, the natural father both of Ningangauda and Rudragauda. A different pedigree of the family was produced by Rudragauda on this occasion, now Ex. 136, which showed a different common ancestor, and also purported to show that one Irappa Ghullappa was a nearer heir than Giriyeppa in Giriyeppa's own branch. This Irappa, who is defendant 3 in the present suit, had given his consent to the adoption of Rudragauda and had also made an assignment of his own rights in his favour. This suit was settled by a consent decree under which two fields were assigned to Irappa Ghullappa, and the rest of the land was divided roughly half and half between Giriyeppa and Rudragauda. These two were also held entitled to the right of service in equal shares. In the joint application for recording the compromise, Giriyeppa admitted the correctness of the pedigree and the validity of the adoption of defendant 2. As the result of the compromise Giriyeppa and defendant 3 got possession of the lands assigned to them.

The settlement, however, was not recognized by Government. Giriyeppa died apparently soon after the compromise decree, which was dated 3rd January 1902, and the name of his widow Laxmava was ordered to be entered as representative watandar. In 1906 an application was made on behalf of defendant 2 that he should be shown as entitled to a half share in the right of service, but this was rejected. After he attained his majority Rudragauda brought Suit No. 122 of 1912 for a declaration that the compromise decree was null and void, for entry of his name in the watan register

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and for possession of the land held by Laxmava. This suit was dismissed. Rudragauda, however, persevered; in 1921 he made another application to the Deputy Collector for having his name entered as representative watandar, and in this attempt he was successful. The order made in his favour by the Deputy Collector was confirmed by the Collector. It was reversed by the Commissioner, but was restored by Government. The Government Resolution dealing with the case is Ex. 144. No reasons are stated in the resolution itself, but from the attached correspondence it appears that Government accepted the position that Baslingappa was born before the adoption of his father Parutagauda and remained a member of the Masuti watan family, that on his death his widow Nagava succeeded him and that she was not postponed to Giriyeppa who was held to be a stranger to the family. In the meanwhile the present plaintiff had been adopted by Laxmava on 21st October 1920, and he brought this suit on 14th April 1928.

In the plaint he prayed for the following reliefs: (a) a declaration that defendant 2 was not the patilki watandar of Masuti, (b) a declaration that plaintiff is entitled to have his name entered in the watan register for the 16 annas right of patilki service, and (c) possession of the lands in the possession of the defendants. That is to say, he seeks possession in this suit of the land which was assigned to those defendants by the compromise decree of 1902. The allegations in the plaint, so far as they are material, were that the adoption of defendant 2 is invalid that' Baslingappa and San Irappa were born after the giving in adoption of their father Parutagauda, and that, even if the adoption of defendant 2 is valid, he is not a watandar of the Masuti watan and therefore he would acquire no right to the lands in suit under the compromise decree. The allegations in the written statements, so far as they are material, were that Baslingappa was not born after the adoption of Parutagauda but before, that on his death in 1877 his widow Nagava succeeded him as heir and that she also succeeded Ningangauda in 1891, that Irappa Ghullappa, defendant 3, is a nearer heir than Giriyeppa, that the adoption of defendant 2 made with the consent of Irappa was valid, that the suit is barred by the provisions of the Revenue Jurisdiction Act, and also by limitation. The issues framed by the trial Judge were as follows: (1) Whether Baslingappa was born after the adoption of his father into another family. The finding is that he was born before the adoption. (2) If not, are Baslingappa and his son watandars of the Masuti patilki watan? The finding is in the negative. (3) Is the suit barred by S. 4, Revenue Jurisdiction Act? The finding is that plaintiff's claim for the declaration is barred, but not his claim for possession. (4) Can plaintiff contend that the compromise in Suit No. 943 of 1900 is not binding on him? The finding is no. (5). Is plaintiff's adoption proved? Finding in the affirmative. (6) Is it invalid as alleged by defendants? Finding in the negative. (7) Was Giriyeppa the nearest heir to Ningangauda? Finding in the negative. (8) If not, can plaintiff be the heir to the suit property? Finding in the negative. (9) Is defendant 2 the validly adopted son of Baslingappa? Finding in the affirmative. (10) Is he entitled to claim any part of the watan property of Masuti? Finding in the affirmative. (11) Is the suit in time? On this no finding is recorded, as in the learned Judge's view the issue did not survive. The findings on the 1st, 3rd, 4th, 7th, 8th, 9th and 10th issues are against the plaintiff; the finding on issue 3 is in part against him. The finding on issue 2 appears to be in his favour, but it is not altogether easy to reconcile it with the finding on issue 10.

It will be convenient to deal first of all with the issue as to the effect of the compromise decree in the suit of 1900. The trial Judge has held that plaintiff is bound by this decree, and in my opinion he is right. It is a judgment inter partes, for plaintiff claims through Giriyeppa, and unlesss he can get rid of it, it is difficult to see how he can get any relief in this suit. The lands which he seeks to recover were awarded to the defendants by the decree, which moreover was based on the admission of Giriyeppa as to the correctness of the pedigree relied on by the defendants and the validity of the adoption of defendant 2. That means that the decree recognized a position entirely inconsistent with that now set up by plaintiff as Giriyeppa's adopted son. The argument on plaintiff's behalf here, as in the lower Court, is that the compro-

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mise amounted to an alienation to persons who were not watandars, and was therefore contrary to S. 5, Watan Act, and unlawful. Let us assume for the moment that that was so. That would be a good ground for setting the decree aside, but it would not render the decree a nullity or get rid of the necessity of getting it set aside in due course of law and within the period of limitation. It was held in 33 Bom 479 (1) that the plea of estoppel by res judicata may prevail even when the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute. The Court relied on the judgment of the Privy Council in 1899 A C 114 (2). The relevant passage in the judgment of Lord Hobhouse is at p. 124 of the report. I may premise that the appeal arose out of an action to impeach a judgment on a contract alleged to be ultra vires of the company. His Lordship said:

> It is quite clear that a company cannot do what is beyond its legal powers by simply going into Court and consenting to a decree which orders that the thing shall be done. If the legality of the act is one of the points substantially in dispute, that may be a fair subject of compromise in Court like any other disputed matter. But in this case both the parties . . . were equally insisting on the contract. The president, who appears to have been exercising the powers of the company, had an interest to maintain it, and took a large benefit under the judgment. And as the contract on the face of it is quite regular, and its infirmity depends on extraneous facts which nobody disclosed, there was no reason whatever why the Court should not decree that which the parties asked it to decree. Such a judgment cannot be of more validity than the invalid contract on which it was founded.

The particular passage which was referred to in 33 Bom 479 (1) was the sentence (p. 482.): "If the legality of the act is a point substantially in dispute it may be a fair subject of compromise in Court like any other disputed matter." The concluding sentence of the passage which I have cited, "such a judgment cannot be of more validity than the invalid contract on which it was founded," might at first sight perhaps appear to suggest that such a decree would be a nullity which it is not necessary to set aside. But that is not in fact what was held in the case, and as I have said, the appeal arose in a suit to impeach the judgment. Another case on the same point, viz. that a decree based on an agreement which is bad in law is binding until set aside, is 13 Bom L R 649 (3). At p. 656, Batchelor, J. observed as follows:

> But the question is whether in this suit the plaintiffs are entitled to give the go-by to a particular clause in an existing decree on the ground that that clause, if resting on no higher authority than the agreement between the parties, would be bad in law. We think that this question must be answered in the negative. It may be though we express no opinion as to this—that in a suit properly framed for that purpose the plaintiffs might have been able to get the decree set aside. But no such suit has been brought, and the decree is a subsisting decree; nor does it, we think, make any difference that it was taken by consent of the parties who were all sui juris. The decree stands, and while it stands, it operates as an estoppel between the then parties and their present representatives.

The learned Judge referred to (1895) 2 Ch 273 (4). On the other hand we were referred to some observations of Fawcett, J. in 23 Bom L R 1037 (5). That case was decided by a single Judge, and moreover the authority there referred to, a judgment of the Privy Council in 24 Bom 556 (6), did not deal with the case of a decree whether on a compromise or otherwise. All that was held was that a mortgage which contravenes the provisions of the Watan Act is void. I do not think therefore that there is anything in this case which weakens the effect of the two decisions which I have cited. But if the compromise decree is to be treated as good unless or until it be set aside, it is clearly too late now to get it set aside. The cause of action in that respect would accrue to the plaintiff on his adoption in 1920, and the longest period available to him, viz. the period for a suit for a declaration that the decree did not bind him, would be six years from 1920, under Art. 120, Lim. Act. I may also point out that it seems to be at least doubtful whether this particular compromise could be said to amount to an alienation within the meaning of S. 5. In that connexion I may

1. Chhaganlal v. Bai Harkha, (1909) 33 Bom 479=2 I C 530=11 Bom L R 345.
2. G. N. W. C. Ry. v Charlebois, (1899) A C 114=68 L J P C 25=79 L T 35.
3. Cowasji v. Kisandas, (1911) 35 Bom 371=11 I C 984=13 Bom L R 649.
4. Huddersfield Banking Co., Ltd. v. Henry Lister & Son, Ltd., (1895) 2 Ch 273=64 L J Ch 523=12 R 331=72 L T 703=43 W R 567.
5. Ganesh v. Bhausaheb, 1922 Bom 110=64 I C 208=46 Bom 345=23 Bom L R 1037.
6. Padapa v. Swamirao, (1900) 24 Bom 556=27 I A 86=2 Bom L R 548.

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refer to 47 Bom 597 (7) and the cases there cited. It was pointed out there that the Courts lean in favour of such family arrangements. So that even if the defendants must be held to be non-watandars, the compromise decree in my opinion would be a sufficient answer to the plaintiff's suit. But even on that point I am not prepared to hold in plaintiff's favour. On the whole I think we must accept the trial Judge's finding that Baslingappa was born before his father went in adoption to the Shirol family, though I admit that the evidence is by no means conclusive on the point. (His Lordship then discussed the evidence on the point and proceeded). The burden of proof is therefore on the plaintiff, and the trial Judge's finding on the first issue must, I think, be accepted. I may say that even if Baslingappa was born after the adoption, it would not necessarily follow that he was not a watandar of the Masuti watan. At p. 6 of the print the learned trial Judge has referred to evidence which appears to show that before the year 1846 Baslingappa owned some watan land in the village. The definition of watandar in the Act includes a person holding a watan property acquired by him before the introduction of the British Government into the locality of the watan. It is an admitted fact that the village of Masuti came under British rule for the first time in 1848.

I will next deal with the argument of learned counsel for the plaintiff that even if Baslingappa remained a member of the Masuti watan family, defendant 2 as his adopted son would not become a watandar. Ningangauda, as I have said, had a sister Ningava who survived him and was a party to the heirship proceedings commenced in 1891. Failing a male heir, Ningava would succeed and not Nagava, who was merely the widow of a gotraja sapinda. Actually Giriyeppa proved his claim to the satisfaction of the Court and the revenue authorities and the succession passed to his line. But even if he had failed to prove his claim, Nagava would not have been the heir. Her adoption of defendant 2 as son to Baslingappa, though valid as an adoption, (the original contention that the adoption was invalid has been given up) would not, according to this argument, give the adopted son any interest in the Masuti watan, for Nagava was not the widow of the last male holder. There is certainly authority for this view in 24 Bom 484 (8) and 37 Bom 598 (9). But the latter case has been doubted if not overruled in 60 I A 242 (10). In view of the principles enunciated by the Judicial Committee in the latter case and in 46 I A 97 (11), it cannot be denied, I think, that defendant 2 on his adoption in 1900 acquired the status which a natural son of Baslingappa if born in that year would have had, and that, I think, would suffice to make him a watandar within the definition in the Watan Act. It is not necessary for the purposes of this case to consider whether the adoption would have the effect of divesting Giriyeppa's estate. As Baslingappa's son he had a hereditary interest in the watan. He was a watandar. He was indeed a nearer heir of Ningangauda than Giriyeppa himself. Therefore the alienation of watan property to him would not be within the mischief of S. 5.

These findings as to the effect of the compromise decree are really enough to dispose of the case, but it is desirable to refer to some of the other issues. It is contended that the suit is barred by S. 4, Revenue Jurisdiction Act 10 of 1876, which removes from the jurisdiction of the civil Courts, among other things, claims against Government relating to any property appertaining to the office of any hereditary officer, claims to perform the duties of any such officer and suits to set aside or avoid any order under Act 3 of 1874. Declaration (b) in the form in which it is prayed for in the plaint must be said, I think, to be in effect a claim to perform the duties of patil, for no one but a registered watandar or his deputy can perform the duties under the terms of the Act. Prima facie therefore such a declaration cannot be granted. But plaintiff's learned counsel has conceded that, Government not being a party, no order which he can obtain in this suit will necessarily be binding on Government,

7. Basangowda v. Irgowadatti, 1923 Bom 276=73 I C 196=47 Bom 597=25 Bom L R 293.

8. Krishnaji v. Tarawa, (1900) 24 Bom 484=2 Bom L R 276.
9. Bhimabai v. Tayappa Murarrao, (1913) 37 Bom 598=21 I C 107=15 Bom L R 783.
10. Amarendra Mansing v. Sanatan Singh, 1933 P C 155=143 I C 441=60 I A 242=12 Pat 642 (P C).
11. Pratapsingh Shivsing v. Agarsingji Raisingji, 1918 P C 192=50 I C 457=46 I A 97=43 Bom 778 (P C).

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and he says that he would be quite content with a declaration that defendant 2 is not a watandar of this watan, and with a declaration in plaintiff's favour in the form allowed in 54 Bom 125 (12). It was held in that case, after a full discussion of the authorities including the Privy Council case in 54 I A 380 (13), that there is nothing in the Revenue Jurisdiction Act to prevent civil Courts granting a declaration that a person is the nearest heir of a deceased representative watandar and the declaration was actually granted in the form that plaintiff was entitled to have his name registered as the nearest heir in preference to the defendant whose name had been registered by the revenue authorities. Patkar, J. distinguished the Privy Council case on the ground that it dealt only with a claim to a watan office and not with a claim for a declaration of status as watandar. In 54 I A 380 (13), the discussion of the Revenue Jurisdiction Act was very brief and there was no reference to authorities. Their Lordships merely said after setting out the provisions of S. 4 of the Act (p. 394):

> In their Lordships' opinion these words are wide enough to preclude the Courts from entertaining any claim to the watan offices in opposition to the claim of the hereditary officers recognised or appointed under the Act, and also any claim for the cancellation of the watan register. To this extent therefore the plaintiff's case must fail.

The difficulty is that the declaration asked for in that case, which their Lordships held to be barred, was a declaration that plaintiff was and defendants were not watandars, patils and kulkarnis of the village, and this is not very easily distinguishable from the declaration which plaintiff seeks. However, it is clear that 54 I A 380 (13) cannot have been intended to throw any doubt on the jurisdiction of the civil Courts to decide disputes between persons claiming to be watandars inter se, as to their status in the watan family. S. 36, Bombay Hereditary Offices Act, both before and after its amendment in 1910, contemplates a decree of a civil Court as a matter which has to be taken into consideration by the Collector in determining whose name has to be entered as representative watandar.

An application has been made on plaintiff's behalf to amend the plaint so that declaration (b) would read as follows: "As the deceased Giriyeppagauda was the nearest heir to the deceased Ningangauda Dod Irangauda, it should be declared that plaintiff who is the adopted son of the said Giriyeppagauda is the nearest heir to the said deceased Ningangauda Dod Irangauda in preference to Rudragauda, defendant 2." In my opinion there is nothing in the Revenue Jurisdiction Act which would bar the Court from granting a declaration in this form. But this question is really academic, because on the merits it cannot be held that the plaintiff is the nearest heir of Ningangauda in preference to defendant 2. I should be prepared to hold on the evidence that Giriyeppa was the nearest heir of Ningangauda when the succession opened in 1891. I feel considerable doubt as to the correctness of the learned trial Judge's view that the defendants' pedigree, Ex. 136 is reliable and to be preferred to plaintiff's, which is Ex. 109. Ex. 136, is not an original document. It is a certified copy of a pedigree purporting to have been produced in an heirship inquiry in 1852. However it appears that the original was produced in the suit of 1900 by a witness who deposed that he had written it.

He was then 75 years old and is presumably now dead. His deposition has been put on the record, Ex. 105, and it is admissible under S. 33, Evidence Act. Ex. 138 which is relied on in support of Ex. 136 is also a copy, and in this case there is no proof whatever of the original. No presumption can be drawn under S. 90 as to the genuineness or due execution of the original: 37 Bom L R 805 (14). No doubt the defendants' pedigree is supported by Giriyeppa's admission in 1902, whatever that may be worth. Plaintiff's pedigree, Ex. 109, is based on an original document which was produced and proved and accepted by the Court in the litigation which began in 1891. It has been in Court custody ever since, and plaintiff applied that it should be called for and placed on the record. This was refused as the application was made at a late stage, but, as we were of opinion that the application ought to have been allowed,

12. Hanmant Ramchandra v. Secy. of State, 1930 Bom 254=129 I C 391=54 Bom 125=32 Bom L R 155.
13. Laxmanrao Madhavrao v. Shrinivas Lingo, 1927 P C 217=105 I C 694=54 I A 380=51 Bom 830 (P C).
14. Basant Singh v. Brijraj Saran Singh, 1935 P C 132=156 I C 864=62 I A 180=57 All 494=37 Bom L R 805 (P C).

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we have had the document placed on record in this appeal. It is dated 1858 and purports to bear the signatures of Irappa Ningappa and San Irappa, which, in view of the age of the document, may be presumed to be genuine. The main differences between the pedigrees appear to be these: Ex. 136 introduces the Shirol family, one Bharamgauda and his descendants, as a branch of the Masuti family. But in this respect it is not supported even by Ex. 138 and, though a blood relationship between these two families would seem to be the most natural explanation of the extraordinary history of Parutagauda's descendants, who were treated as having rights in both watans, it can hardly be said to be proved. The other main point of difference is in respect of Giriyeppa's branch or the branch of the Biradars as it is called. In Ex. 136, Giriyeppa is shown as many degrees further removed from the common ancestor than is the case in the plaintiff's pedigree, and Ghullappa Basappa, who is alleged to be the father of defendant 3, is shown as a nearer heir in that branch than Giriyeppa himself. As to this last point it may be pointed out that, apart from any other consideration, there is no evidence that defendant 3 really is the son of Ghullappa. He even declined to go into the witness-box himself to support his claim.

The trial Judge, who, as I say, was prepared to accept Ex. 136, took the view that the common ancestor of the various branches of the family was so remote that the Biradar's line must have branched off before the acquisition of the watan, and that plaintiff has failed to prove that the watan was acquired by the person shown as the common ancestor in his genealogy or by one of his male ancestors. He is presumably referring to the rule laid down in 19 Bom L R 730 (15). Actually what was decided there was, that in order that a female heir should be postponed to a male under S. 2, Act 5 of 1886, the latter must have descended from a common progenitor who was a watandar. Now in this case there is no evidence to show when or by whom this watan was acquired. The earliest material document on record is Ex. 132, which records the fact that even as long ago as 1770 litigation had been going on from generation to generation between Paravaraddi Veergouda Patil and Lingappa Biradar Patil of Masuti on the one hand and members of the Pancham family on the other.

These two persons cannot be identified with any certainty with persons shown in either pedigree. But I think there can be no doubt that, so far as the remoter generations are concerned, the pedigrees produced are largely speculative and unreliable. This applies as much to the plaintiff's pedigree as to the defendants'. It has actually been shown that there are several inaccuracies in both, though more in Ex. 136 than in Ex. 109. The salient facts, in my opinion, are that, at the earliest time of which we have any reliable record, a person who was certainly the ancestor of the propositus and no doubt of defendant 2 also, was associated with a member of the Biradar family, who must be taken to have been an ancestor of the plaintiff, as representing the Masuti watan, and the further fact, which is undisputed, that the Biradars' branch obtained an eight annas share of the lands of the watan at a partition with the other branches which took place so long ago that there is apparently no record of the date. It is referred to however in the statements of Irappa Ningappa and San Irappa in the litigation between them in 1873, Exs. 89 and 90. In view of this it seems to me to be impossible to say that Giriyeppa was not descended from a common progenitor who was a watandar. That being so, he was entitled to succeed to the propositus Ningangauda under the Act of 1886. But that of course is not enough for the plaintiff. He has to show that he himself is now a nearer heir than defendant 2, and that he cannot be for the reasons which I have already given. Defendant 2 is also a watandar and a nearer heir of Ningangauda than the plaintiff.

The only other matter which I need discuss is limitation. I will deal first with the prayer for possession of the land. Learned Counsel for the plaintiff relies on 19 Bom 809 (16). The facts in that case were that the childless widow of a separated Hindu, who was in possession of his property as his heir, alienated it in 1868, and 20 years afterwards she

15. Bai Laxmi v. Maganlal, 1917 Bom 231=42 I C 450=41 Bom 677=19 Bom L R 730.

16. Moro Narayan Joshi v. Balaji Raghunath, (1894) 19 Bom 809.

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adopted a son, who brought a suit in 1890 to recover the alienated property. It was held that the proper article to apply was Art. 144 and that the suit was not barred. The possession of the defendants did not become adverse to the plaintiff until he became entitled to possession of the property upon his adoption. Their possession may have been adverse to the widow, but that did not affect plaintiff who did not derive his right to sue from or through her. That case however is clearly distinguishable, because when the defendants got possession in 1902 Giriyeppa was alive. He may not have lived long thereafter, but there was at any rate some interval before the widow got possession, in which the lands were held adversely to Giriyeppa. Time therefore began to run in Giriyeppa's lifetime, and, as the plaintiff claims through Giriyeppa and not through the widow, the authority cited does not apply.

In my opinion the suit for possession of the land would be barred by limitation, if it did not otherwise fail. As regards the prayer for a declaration, I do not consider that there is any bar of limitation. It was suggested that the plaintiff ought to have brought a suit under Art. 14, Lim. Act, to set aside the order of the revenue authorities within a year of the Government Resolution of 1926. But, in my opinion, this is not really a suit to set aside or avoid the orders of the revenue authorities. At any rate it could not be so described if the proposed amendment of the plaint were allowed, and we should have been prepared to allow it if it had been necessary. What the plaintiff is seeking is the determination, as between him and the defendants, of their respective status as watandars, and having obtained this determination he proposes to approach the revenue authorities to reconsider their order. As I have already pointed out, the provisions of the Watan Act itself appear to contemplate such a suit which cannot reasonably be regarded as a suit to set aside or avoid any order. So far as the declaration is concerned, therefore, the plaintiff would have a period of six years from the date of the Government Resolution, 1926. But for the various reasons which I have given I hold that the appeal fails and must be dismissed with costs.

N. J. Wadia, J.—The two main questions which are to be decided in this appeal are those covered by issues 3 and 4 framed by the trial Court, whether the suit is barred by S. 4, Revenue Jurisdiction Act, and whether the plaintiff can contend that the compromise entered into by his adoptive father Giriyeppa with defendant 2 in Suit No. 943 of 1900 is not binding on him. It is contended that this is not a suit against Government, but a dispute between rival claimants to a watan, and therefore does not fall within the purview of S. 4, Revenue Jurisdiction Act. In support of this contention reliance is placed on the decision of this Court in 54 Bom 125 (12), in which it was held by this Court, following a long series of previous decisions of this Court, that the civil Court has jurisdiction to grant a declaration to a plaintiff that he was the nearer heir to a deceased representative watandar than the defendant, and that such a suit was not barred by S. 4, Bombay Revenue Jurisdiction Act, but was expressly saved by proviso 3 to S. 36, Bombay Hereditary Offices Act. The decision of the Privy Council in 29 Bom L R 1484 (17), on which the defendants rely, and the question whether that decision overruled the view taken by the previous Bombay decisions was considered in 54 Bom 125 (12) and it was held that it did not overrule them.

The ground on which the distinction was made was the suits which, according to the decision of the Privy Council were barred, were those in which a claim was made to the watan office or for cancellation of the watan register. The distinction made appears to me to be clear. Cl. (b) of the prayer in the plaint in this suit, as it stands, would, therefore, be clearly barred by S. 4, Revenue Jurisdiction Act. But the plaintiff has put in an application for amendment by which he asks only for a declaration that as the deceased Giriyeppa was the nearest heir to Nigangauda Dod-Irangauda, the plaintiff who is the adopted son of Giriyeppa is the nearest heir to the deceased Ningangauda in preference to defendant 2. Thus amended the relief asked for is clearly admissible according to the decision in 54 Bom 125 (12) and the previous rulings there relied on, and according to the express language of S. 36, Watan Act. It was contended that the compromise

17 Laxmanrao v. Shrinivas, 1927 P C 217=105 I C 694=54 I A 380=51 Bom 830=29 Bom L R 1484.

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between Giriyeppa and defendant 2 in suit No. 943 of 1,900 was not binding on the plaintiff, because it offended against the provisions of S. 5, Watan Act, Giriyeppa having by that compromise alienated some portion of the watan property to defendant 2, who, it was urged, was not a watandar of the Masuti watan. The plaintiff's case was that Baslingappa's father Parutagauda had gone in adoption to one Venkangauda, a watandar of a different watan, that of Shirol in the Dharwar district, and that Baslingappa was born after his father's adoption and therefore ceased after that adoption to be a member of the watan family of Masuti. The question whether Baslingappa was born before Parutagauda's adoption, as contended by the defendants, or after it, as contended by the plaintiff, is not altogether free from doubt. There is no very convincing evidence as regards the year in which Baslingappa was born, and as regards the year in which Parutagauda was adopted into the Shirol family. The evidence as regards the year of Baslingappa's birth consists of a statement with regard to Baslingappa's age in the entry in the death register about Baslingappa's death, and in two statements made in 1874, and 1879 by San Irappa, the younger brother of Baslingappa, about his own age. According to those statements San Irappa was born about 1824 or 1825. There is a statement of the plaintiff's adopted father Giriyeppa in 1898, in which he said that Baslingappa was twenty years older than his younger brother San Irappa. This would give the year of Baslingappa's birth as 1805, which is also the year indicated by the entry in the death register about Baslingappa's death. These statements, however, although admissible in evidence, can only be regarded as giving the approximate year of Baslingappa's birth.

The evidence with regard to the year in which Parutagauda was given in adoption is still less definite. It certainly suggests, however, that the adoption took place some time after 1823 and probably between 1823 and 1833. Considering the long period of time which has elapsed since the occurrences took place, one can hardly expect more convincing evidence. On the other hand there is a considerable amount of evidence to show that Baslingappa claimed and enjoyed the Shirol watan and acted as patil of Shirol for over twenty-five years. This could ordinarily have happened only if he had himself become a member of the Shirol family as a result of his father's adoption, and according to the present law that could only be if he had been born after his father's adoption. But there is also evidence to show that after Parutagauda's adoption both his son Baslingappa and San Irappa continued to hold watan property in Masuti. Ex. 90, a statement made by San Irappa in 1874, shows that he had been holding some of the watan lands from 1854 onwards, and Ex. 134 shows that Baslingappa held some of the watan lands in 1846.

This conflicting evidence with regard to Baslingappa's position may be due to the fact that the legal position of a person whose father was adopted into another family, was not clear at that time. But the evidence with regard to the dates of Baslingappa's birth and Parutagauda's adoption is at least sufficient, in my opinion, to show that Basalingappa was born before his father's adoption and, that being so, he would continue to be a member of the Masuti family, and this conclusion is strengthed by the fact that he did continue to hold watan lands in Masuti long after his father's adoption. He would therefore be a watandar of the Masuti watan according to the definition of 'watandar' in S. 4, Watan Act, both as having been born before his father went into adoption into the Shirol family, and as having held watan lands in 1846, two years before the village came under British rule. The adoption of defendant 2 by Nagava has been admitted in this appeal. The alienation to defendant 2 by the compromise in Suit No. 943 of 1900, even if it amounted to an alienation, would not, therefore, be barred under S. 5, Watan Act. On this view the plaintiff would be clearly bound by the compromise decree in that suit. Even if it were held that Baslingappa was not a watandar of the Masuti watan, and that the compromise in that suit was illegal as offending against S. 5, Watan Act, plaintiff would, in my opinion, still be bound by it. The compromise was embodied in a decree and the decisions in 33 Bom 479 (1) and 35 Bom 371 (18)

18. Cowasji Temulji v. Kisandas Tricumdas, (1911) 35 Bom 371=11 I C 984=13 Bom L R 649.

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clearly support the defendants' contention that the consent decree would act as an estoppel until it was set aside by a proper suit, even though the effect of it might be to sanction something that was illegal in the sense of being prohibited by law. Plaintiff has taken no steps to have that decree set aside, and the time within which he could have done so has now passed. He is, therefore, clearly bound by that decree.

In the compromise application in the suit of 1900, Giriyeppa had admitted the correctness of the genealogy, Ex. 136, on which the defendant has relied in this suit. On the view which I have taken Baslingappa was a member of the Masuti watan family and defendant 2, as a result of his adoption in 1900, also acquired that position. That being so, he was clearly a nearer heir to Ningangauda than Giriyeppagauda. On this ground also the suit must fail. I agree, therefore, that the appeal must be dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Bombay 310

BEAUMONT, C. J. AND RANGNEKAR, J.

Calico Printers Association Ltd. — Plaintiffs—Appellants.

v.

Ahmed Abdul Karim Bros.—Defendants —Respondents.

Original Civil Jurisdiction Appeal No. 42 of 1935, Decided on 26th February 1936.

Costs—Levy of—Suit for injunction restraining wrongful user — Application for injunction granted ex parte—On hearing of motion costs in motion made costs in cause—Separate orders should have been passed.

Where in a suit for injunction restraining the defendants from wrongful user of the plaintiff's registered design, an application is made for an injunction and heard ex parte with an order for costs being made in the motion and on the hearing of the motion the injunction is continued and costs of the motion are made costs in the cause, the ex parte motion and the motion inter partes is not only one motion. The proper form of order in such cases is to make two distinct orders since there are two motions and separate steps may be taken to enforce each of those orders. [P 310 C 2; P 311 C 1]

V. F. Taraporewala—for Appellants.
Jamshed Kanga—for Respondents.

Beaumont, C. J.—This is an appeal from an order made by B. J. Wadia, J. which raises rather an important question of practice. The suit is a suit for an injunction to restrain the defendants from wrongful user of the plaintiffs' registered design, and an application was made ex parte for an injunction, and on that application an injunction was granted by Divatia, J. until the hearing of the motion, costs being made costs in the motion. When the motion was heard, B. J. Wadia, J. continued the injunction until the trial, and directed that the costs of the motion be costs in the cause. Now if an order had been drawn up in those terms, in my opinion, it is quite clear that the applicants would have got separate sets of costs for the ex parte motion and the motion on notice. They would have got, since no contrary direction had been given, Rs. 125 for the ex parte motion under item 54 of the Table of Fees, and they would have got Rs. 175 for the costs of the contested motion. But when the order of B. J. Wadia, J. came to be drawn up, the defendants' attorneys inserted a provision that the costs of the ex parte application and of this order, viz. Rs. 175, be costs in the cause, that is to say, they sought to limit the costs of both motions to Rs. 175. The plaintiffs' attorneys, who presumably thought they would have the better chance of ultimately getting the costs, objected, and the matter was placed before the learned Judge again to determine the point.

The learned Judge gave a judgment on the matter, and I think that the effect of it is that he did make an order that the costs of the motion be costs in the cause, but that he intended that to involve only the payment of the one lump sum set of costs, viz. Rs. 175, and as the order had not been passed and entered, the learned Judge was entitled to put it into such a form as would carry out what he really intended, although the actual effect of the language he used at the hearing might have produced some other result. In my opinion, therefore, there is no ground on which we can differ from the learned Judge's order, but I cannot agree with the reasoning on which the order was based. The learned Judge's view is that the ex parte motion and the motion inter partes were only one motion, and, therefore, unless the Judge otherwise directed, there could only be one lump sum as costs, viz. Rs. 175, under item 55. In my opinion, that view is not correct. It seems to me clear that there were two motions, two distinct orders were made, and it might have been necessary to take

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separate steps to enforce each of those orders.

The Judge, however, has an absolute discretion in dealing with the costs of motions, because both item 54 and item 55 are subject to any order to the contrary. It would, I think, generally be better if Judges hearing ex parte motions, instead of making the costs of the ex parte motion costs in the motion to be heard on notice, the effect of which, I think, (unless the costs are limited by the order) is to allow Rs. 125 for the ex parte motion, were to reserve the costs to be dealt with on the hearing of the motion. Then the Judge who hears the motion can do what I understand is done in practice in such cases, namely, allow such additional sum beyond the costs of the motion, as he thinks will compensate the successful party for the costs of the ex parte motion. Technically the proper form of order in such cases is to allow so much under item 54 for the ex parte motion, and so much under item 55 for the inter partes motion. To take an illustration, supposing the Judge desires to allow an extra Rs. 50 for the ex parte motion, instead of providing, as I understand is generally done in practice, that Rs. 175 plus Rs. 50 will be allowed for the costs of the motion (treating the two motions as one), to direct that Rs. 175 is allowed for the motion inter partes, and Rs. 50 is allowed for the ex parte motion under item 54.

The net result comes to the same thing, but the method I have suggested preserves what seems to be the correct view, namely, that there are two motions, and not only one motion. In the present case the learned Judge could justify the order which he made by saying that as the order already made by Divatia, J. allowed Rs. 125 for the ex parte motion, and as the Judge did not intend the successful party on the two motions to get more than Rs. 175, he allowed only Rs. 50 under item 55 for the inter partes motion. That carries out in a technically correct form the order which the learned Judge says that he intended to make. That being so, I do not think, there is any ground for interfering in appeal. There was a preliminary objection that an appeal does not lie, but as we do not think it necessary to make any order on the appeal, it is not necessary to discuss whether an appeal lies. I assume, without deciding, that it does. The appeal is dismissed with costs.

Rangnekar, J.—I agree.

R.W./R.K. *Appeal dismissed.*

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DIVATIA, J.

Balkrishna Vaman Kharkar—Applicant.

v.

Sakharam Habaji Mestry—Opponent.

Civil Revn. No. 127 of 1935, Decided on 23rd January 1936, against order of Asst. Judge, Thana, in Misc. Appeal No. 3 of 1934.

Civil P. C. (1908), O. 21, Rr. 90 and 91—Auction-purchaser is not one whose interests are "affected by the sale"—His case comes not under O. 21, R. 90 but under O. 21, R. 91.

The expression "affected by the sale" in O. 21, R. 90 means affected by reason of the property being sold, i. e., by reason of the fact that a person has interest in the property which would be affected if it is sold. The auction-purchaser is not such a person as his rights come into existence after the sale and his case comes under O. 21, R. 91. The auction-purchaser is therefore not a person whose interests are affected by the sale: 1924 *Pat* 319; 1928 *Cal* 828; 1929 *Rang* 33 and 1932 *Lah* 468, *Rel. on.* [P 312 C 2]

A. G. Desai—for Applicant.

R. W. Desai—for Opponent.

Order. — This application raises an important question relating to the construction of O. 21, R. 90, Civil P. C., on which there has been a difference of opinion in the Indian High Courts and on which there is no authority of this Court. The point arises in this way. A decree directing a sale of an immoveable property was passed and the decree-holder applied to execute the decree. It appears that in the proclamation of sale, a mortgage existing on that property was not disclosed and the property was purchased by the auction-purchaser without the knowledge that the property had been previously mortgaged. Then the auction-purchaser filed an application under O. 21, R. 90, to set aside the sale. That rule runs thus:

> Where any immoveable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

The question therefore is whether an auction-purchaser can be said to be a per-

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son whose interests are affected by the sale because of a material irregularity or fraud in publishing or conducting it. Both the lower Courts have held that the auction-purchaser is a person whose interests are so affected and that therefore he can apply for setting aside the sale. In this application it is contended on behalf of the judgment-creditor that that decision is wrong, that the Court had no jurisdiction to entertain the application, that the case of the auction-purchaser is governed not by R. 90 but by R. 91 which says:

The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

The latest case on this point is 12 Pat 665 (1). There two out of three Judges in a Special Bench were of the opinion that an auction-purchaser is a person "whose interests are affected by the sale" within the terms of R. 90, while one learned Judge dissented from that opinion and held that he did not come within that expression. Two former decisions of that High Court, viz., 3 P L J 516 (2) and 1924 Pat 319 (3) were dissented from and the decision in 47 All 479 (4) and 38 M L J 228 (5) were followed by the majority, while the dissenting Judge followed the decisions in 1928 Cal 828 (6), 6 Rang 621 (7) and 14 Lah 1 (8). It appears that the expression "any person whose interests are affected by the sale" has been substituted for the correspondigg expression in S. 311 of the Code of 1882, "any person whose immoveable property has been sold under this Chapter," and on this wording in the old section it was held in 19 I A 154 (9) by the Privy Council that that section did not apply to an auction-purchaser.

It appears that the legislature has changed the words in R. 90 of the present Code to include not only the judgment-debtor, i. e., the person owning the property, but also all those persons whose interests in the property would be affected by its being sold, e. g., a person having a lien on the property for maintenance, and who can therefore be equally interested in setting aside the sale. The view that an auction-purchaser comes under the phrase "any person whose interests are affected by the sale" is based upon the generality of the expression and the probability of his taking a defective title under an irregular or fraudulent sale, and thus being adversely affected by the sale. The other view is that a person can only be affected by a sale if, previous to or at the time of the sale, he has got some interest in the property, that only those persons who are thus interested in the property can come under this rule, and the auction-purchaser is not such a person, as his rights come into existence after the sale, and that his case is separately provided for in R. 91. An auction-purchaser gets only those rights which are conveyed to him in the sale-certificate and there is no guarantee of title. His remedy may be to institute a suit on the ground that he has been defrauded, but the summary remedy given under R. 90 is not meant for him. I think there is great force in the latter view taken by the Calcutta as well as the Lahore and Rangoon High Courts, and formerly adopted by the Patna High Court, namely, that an auction-purchaser is not a person whose interests are affected by the sale. The expression "affected by the sale" means affected by reason of the property being sold, that is, by reason of the fact that a person has interest in the property which would be affected if it is sold. This construction seems to me to be in consonance with the general scheme of rules relating to execution of decrees, especially Rr. 89, 90 and 91, and the words of R. 90 taken in their context. I am therefore of opinion that the application by the auction-purchaser is not competent and the Court had no jurisdiction to entertain it under R. 90. The order of the lower Court is set aside and the rule is made absolute with costs throughout.

R.W./R.K. *Rule made absolute.*

1. Mahadeo Ram v. Mohan Vikram Sah, 1933 Pat 435=145 I C 421=14 P L T 388=12 Pat 665 (S B).
2. Khetro Mohan Datta v. Sheikh Dilwar, 1918 Pat 636=46 I C 614=3 P L J 516.
3. Kartick Chandra Chatterji v. Nagendra Nath Roy, 1924 Pat 319=74 I C 760=5 P L T 41.
4. Ravinandan Prasad v. Jagarnath Sahu, 1925 All 459=87 I C 278=47 All 479=23 A L J 233.
5. Gopalakrishnayya v. Sanjeeva Reddi, 1920 Mad 145=55 I C 333=38 M L J 228.
6. Surendra Nath Das v. Alauddin Mistry, 1928 Cal 828=116 I C 156=49 C L J 207.
7. K. V. A. L. Chettyar Firm v. M. P. Maricar, 1929 Rang 33=114 I C 538=6 Rang 621.
8. Nihal Chand-Gopal Das v. Pritam Singh, 1932 Lah 468=138 I C 817=14 Lah 1=33 P L R 788.
9. Birj Mohun Thakoor v. Uma Nath Chowdhry, (1892) 20 Cal 8=19 I A 154 (P C).

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A. I. R. 1936 Bombay 313

BEAUMONT, C. J. AND RANGNEKAR, J.

Prahlad Madhoba Ruikar and *others*—Defendants—Appellants.

v.

Aboobaker Abdul Rehman & Co. — Plaintiffs—Respondents.

O. C. J. Appeal No. 36 of 1935, Decided on 28th February 1936.

Letters Patent (Bombay), Cl. 12 — Suit to enforce mortgage is not suit for land—Mortgage executed in Bombay—Property situated outside British India and mortgagor also residing outside British India—Mortgagor can still bring suit in Bombay.

A suit to enforce a mortgage is not a suit for land within the meaning of Cl. 12, Letters Patent, but a suit in personam to recover a debt. [P 313 C 1]

Hence where a mortgage is executed in Bombay, but the mortgagor resides outside British India and though property is also situate outside British India, the mortgagor can still bring a suit in Bombay to enforce the mortgage as a part of the cause of action has arisen within the jurisdiction of the Court by the execution of the mortgage: 1927 *Bom* 278 (*F B*), *Rel. on.* [P 313 C 1, 2]

Jamshed Kanga and *Y. V. Gokhale* — for Appellants.

M. C. Chagla and *M. C. Setalvad*—for Respondent 1.

Beaumont, C. J.—This appeal raises a short question of jurisdiction. The plaintiffs are entitled to a mortgage created by defendants 1 to 5. The mortgage is on property situate outside British India, and defendants 1 to 5 reside outside British India. But the mortgage was executed in Bombay. Under the decision of this Court in 51 Bom 516 (1), by which we are bound, a suit to enforce a mortgage is not a suit for land within the meaning of Cl. 12, Letters Patent, and if that is so, it is clear that the plaintiffs are entitled to bring their suit against defendants 1 to 5, the cause of action having arisen in Bombay. Defendant 6, who is the present appellant, claims a charge on the property, that charge arising under a decree of a Court outside British India. His contention is that as his interest in the property arises outside British India, and the property is situate outside British India, and he resides and carries on business outside British India, the Court has no jurisdiction against him under Cl. 12, Letters Patent.

If he is right, it is obvious that no mortgage of property outside British India could be enforced in this Court, because the mortgagor would only have to create a charge in favour of somebody outside British India, and the chargee could not be brought before the Court, and unless all parties interested in the equity of redemption are before the Court, the Court cannot make a mortgage decree. O. 34, R. 1, Civil P. C., requires all persons interested in the equity of redemption to be before the Court. It seems to me that the true view is that where a person procures a charge on a property which is mortgaged and that mortgage is capable of being enforced in this Court, the person taking that charge necessarily confers on the mortgagees a right of action against him, and as that right of action arises on a mortgage made within the jurisdiction of this Court, the cause of action must be taken to arise within the jurisdiction of this Court. I think therefore that the judgment of the learned Judge was right, and the appeal must be dismissed with costs.

Rangnekar, J.—The question raised in this appeal is not free from difficulty. Upon the whole however I have reached the conclusion that the judgment appealed from must be affirmed. This is a suit to enforce a mortgage which, under the ruling in 51 Bom 516 (1), which is binding on this Court, is not a suit for land, but a suit in personam to recover a debt. The appellant does not reside or carry on business in Bombay, and that being so, the only question is whether a part of the cause of action has arisen within jurisdiction. Now the plaintiffs' case is that the mortgage was executed in Bombay. Under O. 34, R. 1, Civil P. C., all persons interested in the equity of redemption are necessary parties, and must be joined in a suit to enforce a mortgage. The plaintiffs say in their plaint that the appellant claims to have a charge on the property, and they pray that a declaration to establish their mortgage against all the defendants should be granted. On these facts it is difficult to see how a part of the cause of action has not arisen within the jurisdiction of this Court. It is not disputed that leave to sue has been granted. I think therefore the Court had jurisdiction to try the suit as against defendant 6. I agree that the appeal should be dismissed with costs.

R.W./R.K. *Appeal dismissed.*

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1. Hatimbhai v. Framroz Dinshaw, 1927 Bom 278=51 Bom 516=29 Bom L R 498 (F B).

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BEAUMONT, C. J. AND RANGNEKAR, J.

Narendrabhai Sarabhai Hatheesing and *others*—Plaintiffs—Appellants.

v.

Chinubhai Manibhai Seth—Defendant—Respondent.

O. C. J. Appeal No. 47 of 1935, Decided on 6th March 1936.

Letters Patent (Bombay), Cl. 15 — Appeal —Order of Court for breach of undertaking to Court is not 'judgment' — Appeal against, is not competent.

An order of the Court refusing to commit a person for breach of an undertaking given to the Court and embodied in the order of the Court cannot be said to be a judgment within the meaning of Cl. 15, as it does not affect the merits of any question between the parties and hence is not appealable : 25 *Cal* 236 (*FB*), *Not foll*; 8 *Beng L R* 433 and 1933 *Bom* 108, *Ref*. [P 314 C 1]

Jamshed Kanga—for Appellants.

M. C. Chagla—for Respondent.

Beaumont, C. J. — This is an appeal from an order made by B. J. Wadia, J., on a notice of motion to commit defendant 1 for breach of an undertaking given to the Court and embodied in an order of the Court dated 19th April 1933. The learned Judge held that no breach of the order was proved which justified him in committing the defendant to prison ; he did not dismiss the motion with costs, but made no order on the motion, and left each side to pay its own costs. From that order the appeal is brought. A preliminary objection is taken that no appeal lies, and that question turns upon whether the order appealed from is a judgment within Cl. 15, Letters Patent. This Court has always acted upon the definition of "judgment" given by the Calcutta High Court in 8 Beng L R 433 (1), where Couch, C. J. said (p. 452):

> We think that 'judgment' in Cl. 15 means a decision which affects the merits of the question between the parties by determining some right or liability.

It is difficult to see how an order of the Court refusing to commit a man for breach of an undertaking given to the Court can be said to affect the merits of any question between the parties. The undertaking is given to the Court; if it is broken, and that fact is brought to the Court's notice, the Court may take such action as it thinks fit. If it comes to the conclusion that the order has been deliberately broken, it will probably commit the defaulter to jail, but the Court is free to adopt such course as it thinks fit. There seems to be very little authority upon the point. Sir Jamshed Kanga has referred to a decision of this Court in 57 Bom 286 (2) in which it was held that no appeal lay from an order refusing to commit for contempt of a criminal nature, and he says that the basis of that decision was a distinction between contempt of a criminal nature and contempt of a civil nature such as we have to deal with in the present case. But it appears from the judgment in that case that the Advocate General on behalf of the respondent admitted that the order sought to be appealed from was a judgment within Cl. 15, Letters Patent. So that the point which we have to consider in this case was not before the Court in that case.

The only direct authority on the point seems to be a decision of a Full Bench of the Calcutta High Court in 25 Cal 236 (3) in which it was held that an appeal lay from an order refusing an application to commit for contempt of Court. The learned Judges merely expressed the opinion that the order was appealable, and dealt with it upon the merits. They gave no reasons for their decision, and they appear to have relied largely upon the English cases which were cited to them. The law in England is different because there is no English enactment corresponding to Cl. 15, Letters Patent. In my opinion, to hold that this order is appealable would be to depart from the practice which this Court has always followed in adopting the definition of "judgment," to which I have referred. It is impossible to say that this order deals with any question between the parties. It affects only the right of the Court to enforce its own order, and in my opinion such an order cannot be said to be a judgment within the meaning of Cl. 15. The decision of the Calcutta High Court is not binding upon us, and in the absence of any reason for supposing that it has been followed in other High Courts, I think we ought not to follow it. I

1. The Justices of the Peace for Calcutta v. The Oriental Gas Company, (1872) 8 Beng L R 433=17 W R 364.
2. Narayanrao Vithal v. Solomon Moses, 1933 Bom 108=143 I C 691=35 Bom L R 9 =57 Bom 286.
3. Mohendra Lall Mitter v. Anundo Coomar Mitter, (1897) 25 Cal 236 (F B).

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think, therefore, the preliminary objection must be upheld and the appeal dismissed with costs. Cross-objections dismissed with costs. Costs to be set off.

Rangnekar, J.—I agree. This appeal is taken from an order of B. J. Wadia, J., on a notice of motion taken out by the appellants against the respondent for an order that the respondent be committed to jail for committing contempt of this Court by a breach of the undertaking he had given to the Court on 19th April 1933. The appellant alleged that the respondent had committed several breaches of the order which was then made by this Court. B. J. Wadia, J. held that the appellants had not proved the breaches to his satisfaction, though with regard to one or two there was some suspicion, and refused to commit the respondent for contempt. Mr. Chagla on behalf of the respondent has raised a preliminary objection. He says that the order made by B. J. Wadia, J. is not a judgment within the meaning of Cl. 15, Letters Patent. Now, the exact meaning of that expression has given rise to a good deal of controversy in the various High Courts in this country, but so far as this Court is concerned, it has consistently followed a judgment of the Calcutta High Court in 8 Beng L R 433 (1). In that case Couch, C. J. said (p. 452):

> We think that 'judgment' in Cl. 15 means a decision which affects the merits of the question between the parties by determining some right or liability.

Does the order appealed from decide any question between the parties and determine any right of liability ? On the notice of motion there was, in my opinion, no question between the parties. Proceedings for contempt are matters entirely between the Court and the person alleged to have been guilty of contempt. No party has any statutory right to say that he is entitled as a matter of course to an order for committal because his opponent is guilty of contempt. All that he can do is to come to the Court and complain that the authority of the Court has been flouted, and if the Court thinks that it was so then the Court in its discretion takes action to vindicate its authority. It is, therefore, difficult to see how an application for contempt raises any question between the parties, so that any order made on such an application by which the Court in its discretion refuses to take any action against the party alleged to be in the wrong can be said to raise any question between the parties. Sir Jamshed Kanga, however, relies upon the case in 25 Cal 236 (3), where three Judges of the Calcutta High Court were of the opinion that an order like the one we have in this appeal was appealable. No reasons, however, seem to have been given for this opinion, and with all respect to the learned Judges, I am unable to agree that an order refusing to commit the party alleged to have committed a breach of the order of the Court is a judgment within the meaning of Cl. 15, Letters Patent. In these circumstances, I think the preliminary objection must be upheld and the appeal must be dismissed with costs.

R.W./R.K. *Appeal dismissed.*

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BROOMFIELD AND TYABJI, JJ.

Sakharlal Jamnadas—Appellant.

v.

Pirojsha Sorabji Patel and *others*—Respondents.

Letters Patent Appeal No. 8 of 1934, Decided on 17th February 1936, against decision of N. J. Wadia, J., in F. A. No. 83 of 1932.

(a) Execution Sale—Improper description in sale proclamation—Judgment-debtor, aware of error, not taking steps to correct it — Judgment-debtor is estopped from objecting to sale on ground of error in proclamation of sale.

A judgment-debtor is estopped from raising the contention with regard to the improper description of the property in the proclamation of sale when he has been aware of the defect in the proclamation long prior to the sale and took no steps to get the error corrected when it was his duty to have done so: 28 *All* 273; 12 *Mad* 19 (*PC*) and 1927 *All* 513, *Rel. on.* [P 317 C 1; P 319 C 2]

(b) Execution—Attachment—Exemption of agriculturist's house — Objection must be raised before sale—House should be in actual occupation.

Under S. 60 (c), Civil P. C., an agriculturist's house is exempted from attachment, but the objection to attachment must be raised before the sale and not after the sale has taken place. In order to object to such attachment moreover the house should be in actual occupation of the agriculturist. [P 317 C 2 ; P 319 C 2]

(c) Execution Sale—No attachment existing is mere irregularity and does not vitiate sale.

Mere absence of an attachment prior to sale of property in execution amounts to no more than a material irregularity and is not sufficient, unless substantial injury is caused thereby, to

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vitiate the sale: 36 *Bom* 156, *Disting.*; 1926 *Mad* 211; 18 *Cal* 188 and 1923 *Pat* 45, *Rel. on.* [P 318 C 1, 2; P 321 C 1]

(d) Execution Sale—Sale proclaimed to be held between certain hours — Sale closed before the declared hour because higher bids not forthcoming—Held, there was no irregularity.

In a sale proclamation it was declared that the sale would take place between the hours of 11 a. m. to 5 p. m and the same commenced from 12 noon and was closed at 3 p. m. as higher bids were not forthcoming:

Held: that there was no irregularity vitiating the sale: 16 *Cal* 794 and 1927 *All* 241, *Disting.* [P 319 C 1, 2]

K. N. Dharap—for Appellant.

W. B. Pradhan and *M. W. Pradhan*—for Respondents 2 to 8 and 10.

N. J. Wadia, J.—This is an appeal against an order of the First Class Subordinate Judge of Thana refusing to set aside a sale of certain property held in execution of three darkhasts, Nos. 366 of 1924, 447 of 1924 and 271 of 1925, which had been filed by respondents 1 to 8 against the appellant and respondent 11 Balkisandas Tulsidas. A considerable amount of property was to be sold. The bulk of it, consisting of lots Nos. 1, 2, 4 to 12 and 14, was sold in the year 1929. The remaining lots, Nos. 3 and 13, with which this appeal is concerned, were sold on 31st December 1931. The appellant sought to have the sale set aside on various grounds. His first contention was that the proclamation of sale with regard to the properties wrongly mentioned that there was a charge of Rs. 31,035 odd on the whole of lots Nos. 3 and 13, whereas as a matter of fact this charge really subsisted only on the property of respondent 11 Balkisandas, i. e. the whole of lot No. 3 and half of lot No. 13, lot No. 13 consisting of a house, half of which belongs to the appellant and half to Balkisandas. He also alleged that at the time of the sale there was no subsisting attachment on the property, and that the closing of the sale by the Mahalkari before 5 p. m. when, according to the proclamation, the sale was to be held between the hours of 11 a. m. and 5 p. m. was a serious irregularity which caused substantial injury to the appellant. It was further alleged that the house which was sold was not liable to attachment because it was occupied by the appellant who was an agriculturist.

It has been contended on behalf of the respondents that the application to set aside the sale, even if allowed, could affect only the appellant's share of the property (i. e. half of lot No. 13) and could not affect the other half of lot No. 13 and the whole of lot No. 3 with which he is not concerned. O. 21, R. 90 of the Code, allows anyone, whose interests are affected by the sale, to apply to the Court to set aside the sale on certain grounds. It seems to me that the appellant comes within the meaning of the terms "person whose interests are affected by the sale." It is true that as he and Balkisandas were joint-debtors under the decree, the judgment-creditor could have sold the share of the appellant alone without selling the share of respondent 11 to recover his dues. But there is no question that if the share of respondent 11 is wrongly sold for a lower amount, the burden on the appellant's share of the property would to that extent be increased. In my opinion, therefore, the appellant can challenge the sale of the whole property including lot No. 3 and respondent 11's share in lot No. 13.

The lower Court has held that the appellant is estopped from raising the contention with regard to the improper description of the property in the proclamation of sale because he had been aware of the defect in the proclamation long prior to the sale and took no steps to get the error corrected when it was his duty to have done so. It seems to me that the view taken by the lower Court is correct. It is admitted that the charge of Rs. 31,035 odd was on the property of Balkisandas alone and that the proclamation of sale wrongly shows the charge as subsisting on the whole of lots Nos. 3 and 13, including the share of the appellant. It has not, however, been shown that the wrong description of the property in the proclamation was due to any representation made by the creditors. It appears that the mention of this charge as subsisting against the whole property was first made at the time of the sale of some of the other properties of the judgment-debtors on 5th December 1929 by the Collector. Prior to the sale of the property now in appeal, three proclamations relating to it had been issued: one on 22nd May 1931, another on 24th June 1931, and a third in September 1931. In these proclamations the charge was wrongly shown against the appellant's share of lot No. 13 also. O. 21, R. 66, sub-cl. (2), provides that a

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Court, before drawing up a proclamation of the intended sale of property, shall give notice of it to the decree-holder and to the judgment-debtor. It was the duty of the appellant judgment-debtor to have brought to the notice of the Court the error with regard to his share of the property when he received notice of the proclamation.

It has been decided in several cases that where a judgment-debtor has been shown to have been aware of defects in the sale proclamation before the date of the sale and has failed to take action to get them corrected when he could have done so, he shall not be allowed afterwards to object to the sale on the ground of defects in the proclamation. In 28 All 273 (1) it was held that where, after an inquiry as to the nature of the property, of which the judgment-debtors had notice, the Court, in execution of the decree, caused certain immoveable property to be sold by auction as non-ancestral, the judgment-debtors standing by and neglecting to supply the Court with any information as to the nature of the property sold, it was not competent to the judgment-debtors subsequently to seek to have the sale set aside upon the ground that the property was ancestral and ought to have been dealt with in the manner provided by law in respect of such property. The two decisions of the Privy Council in 12 Mad 19 (2) and 49 All 788 (3), which have been referred to by the learned Subordinate Judge in his order, are to the same effect. In 12 Mad 19 (2) their Lordships held that the judgment-debtor having allowed the execution-sale of immoveables to be completed without objecting on the ground afterwards alleged by him, viz. insufficiency of description within the requirements of S. 287, he having been throughout aware of what the description was, the sale is not invalid on this ground alone without more. In the course of their judgment they remarked (p. 25) :

> It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any mis-description of the property attached and about to be sold, which he knew well, but of which the execution creditor or decree-holder might be perfectly ignorant, that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated. That, in their Lordships' opinion, cannot be allowed ...

It was argued for the appellant that in this case the judgment-creditors were equally aware of the defect in the proclamation and that as they too have taken no steps to have the defect remedied, they should not be allowed to take advantage of the sale. In the first place, there is nothing to show conclusively that the judgment-creditors were aware of the defect. The mention of the charge in the proclamation was not first made at their instance, but by the Collector, and it is possible that the error in the proclamation may not have been noticed by the judgment-creditors. Even however, if they had noticed it and took no steps to have it corrected, there is no reason why the sale to which they have raised no objection should be set aside. It is the appellant judgment-debtor who seeks to set aside the sale, and the rulings cited are clear authority for holding that, as he was aware of the defect in the proclamation and took no steps at the proper time to have the defect remedied, he cannot now be allowed to have the sale set aside on the ground of this defect. It was contended that the appellant is an agriculturist and that therefore under S. 60 (c), Civil P. C., the house could not be attached and sold in execution of the decree against him. This again is an objection which the appellant could and should have raised before the sale, and as he did not do so at the proper time, he cannot be allowed to raise the objection now. Apart from this, there is no evidence to show that the house (lot No. 13) was actually in his occupation. S. 60 (c) relates only to a house in the actual occupation of an agriculturist. The other ground on which appellant seeks to set aside the sale is that at the time of the sale there was no subsisting attachment on the property. The objection applies only to the property of respondent 11, Balkisandas. It is not denied that there was a subsisting attachment on the share in the house (lot No. 13) belonging to the appellant.

With regard to Balkisandas's share, it appears that one Jethabhai Deosi, a creditor of Balkisandas, had made a petition to have Balkisandas adjudicated an insol-

1. Behari Singh v. Mukat Singh, (1905) 28 All 273=3 A L J 140=1906 A W N 3.
2. Arunachellam v. Arunachellam, (1888) 12 Mad 19=15 I A 171=5 Sar 265 (P C).
3. Mohan Lal v. Kali Charan, 1927 All 513=102 I C 126=49 All 788=25 A L J 524.

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vent and had obtained an ex parte order of adjudication against him. The Official Assignee of the High Court, in whom Balkisandas's estate vested, got his property freed from attachment. On 19th December 1927 the attachment on his property was actually raised. The ex parte order of adjudication was subsequently annulled. The Subordinate Judge was informed of this on 27th July 1928, and he instructed the Collector to proceed with the sale of Balkisandas's share. The learned Subordinate Judge has taken the view that the annulment of the order of adjudication resulted in the property vesting again in Balkisandas, and automatically revived the attachment which had been subsisting on it on the date of the adjudication and which had been raised as the result of the adjudication. I have doubts whether this view can be taken as correct in view of the fact that the attachment had been expressly raised by the Court. But even assuming that there had been no attachment on the property of Balkisandas at the date of the sale, I do not think that this is a sufficient reason for setting aside the sale. There have been conflicting views held by the different High Courts as to the effect of the sale of property without any attachment.

In 36 Bom 156 (4), it was held by this High Court that where there is no attachment there can be no order as to the sale of the properties. A different view was taken by the Madras High Court in 51 M L J 172 (5). The view there taken was that the sale of properties in execution without an attachment is not void ab initio. The absence of attachment prior to sale is only an irregularity, and the sale will be set aside on the ground of that irregularity only if the Court is satisfied that the judgment-debtor has sustained substantial injury by reason of that irregularity. The same view was taken by the Calcutta High Court in 18 Cal 188 (6), where it was held that after a sale had been confirmed and a sale-certificate granted to the purchaser, the sale is not to be considered as a nullity merely by reason of the absence of any attachment. In 2 Pat 207 (7) the question was again considered. The previous rulings on the question, including the ruling of this Court in 36 Bom 156 (4), were discussed, and it was held that an execution sale of immoveable property is not void merely by reason of an omission to attach the property before the sale. The view taken in the majority of rulings on this point is that the mere absence of an attachment prior to sale of property in execution amounts to no more than a material irregularity, and is not sufficient, unless substantial injury is caused thereby, to vitiate the sale. This is a view with which, with respect, I agree.

It has been admitted by Mr. Dharap for the appellant that it has not been shown that any substantial injury has been inflicted on the appellant owing to the want of attachment. The sale cannot therefore be set aside on the ground that there was no subsisting attachment on the property of Balkisandas at the time it was sold. The last objection urged by the appellant against the sale is that there was a material irregularity with regard to the time at which the sale was held. The proclamation about the sale of the property mentioned that the sale would take place between the hours of 11 a. m. and 5 p. m. It was alleged for the appellant that the sale was actually completed at 1-30 p. m., and that in consequence certain persons who had come to bid and who were willing to offer a higher price for the property were prevented from bidding. From the statement of the Mahalkari who actually held the sale, it appears that the sale was commenced at 12 noon and completed at 3 p. m., as no higher bidder came forward. On behalf of the appellant, certain rulings have been cited to show that as the sale was not held at the time stated in the proclamation, there was a material irregularity sufficient to justify the setting aside of the sale. These cases however do not help the appellant. In 16 Cal 794 (8) the sale had been held an hour before the time stated in the proclamation. In 49 All 402 (9) the sale had been

4. Sorabji Coovarji v. Kala Raghunath, (1912) 36 Bom 156=12 I C 911=13 Bom L R 1193.
5. Subramania Aiyar v. Krishna Aiyar, 1926 Mad 211=92 I C 833=51 M L J 172.
6. Kishory Mohun Roy v. Mahomed Mujaffar Hossein, (1891) 18 Cal 188.
7. Wazir Narain Singh v. Bhikhari Ram, 1923 Pat 45 = 68 I C 363 = 3 P L T 765 = 2 Pat 207.
8. Basharutulla v. Uma Churn Dutt, (1889) 16 Cal 794.
9. Babu Ram v. Inamullah, 1927 All 241 = 99 I C 926=25 A L J 302=49 All 402.

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adjourned to another day, and the time at which the sale would be held was not mentioned in the proclamation. It was held that this was a material irregularity and that the hour at which the sale is to be held is only of slightly less importance than the day, and ought to be clearly announced to the public.

In the present case neither of these rulings can apply. The hours between which the sale was to be held were mentioned in the proclamation and the sale was actually held between those hours. I do not think it can be reasonably held that when the proclamation mentioned that the sale would take place between 11 a. m. and 5 p. m., it must necessarily go on till 5 p. m. There was sufficient notice to the public that the sale would commence at 11 a. m., and it was the duty of intending bidders to see that they were present at the place fixed for the sale from that hour. Once the sale had begun, the Court could not be expected to keep it open till the closing hour if it found that there were sufficient bidders present, and the sale could be finished much earlier. I do not therefore think that the closing of the sale at 3 p. m. could be held to be an irregularity. No sufficient cause has been shown for setting aside the sale. The order passed by the lower Court is therefore confirmed and the appeal dismissed with costs. There will be only one set of costs.

Letters Patent Appeal.

Broomfield, J. — This is an appeal under the Letters Patent from a judgment of N. J. Wadia, J. in execution proceedings. Certain property was sold in execution of a money decree. An application was made to set aside the sale which was dismissed by the trial Court. N. J. Wadia, J. on appeal confirmed the trial Court's order. The date of the sale was 31st December 1931. The property consisted of two lots, Nos. 3 and 13, and the appellant before us, one Sakharlal, had a half-share in lot No. 13 only, which is a house. Lot No. 3 and a half of lot No. 13 belonged to another judgment-debtor, Balkisandas Tulsidas. The grounds on which the sale was sought to be impeached were : firstly, that there was a wrong description of the incumbrances on the property in the sale proclamation ; it mentioned that there was a charge of Rs. 31,000 odd on the whole of lots Nos. 3 and 13, whereas, as a matter of fact, this charge really subsisted only on the property belonging to Balkisandas ; secondly, there was no attachment subsisting at the time of the sale ; thirdly, the sale was stopped prematurely ; and fourthly, the house was in the occupation of the appellant who is an agriculturist and was therefore not liable to be sold.

The only point of substance in this appeal is that relating to the question of attachment. As regards the inaccurate statement in the proclamation about the charge on the property, there had been several previous proclamations in which the same mistake occurred. The judgment-debtor had clear notice of it and ample opportunity of getting it corrected, and the cases cited by N. J. Wadia, J. show that under the circumstances he cannot make a grievance of it after the sale is completed. The same considerations apply to the objection that the house cannot be sold because it is the appellant's residential house. Moreover, as N. J. Wadia, J. says, there is no evidence that the house was actually in his occupation. The point about the time of the sale has not been pressed. The evidence shows that the sale was advertised to take place between the hours 11 a. m. and 5 p. m. and it was actually commenced at 12 noon and completed at 3 p. m.

The objection that there was no subsisting attachment is not quite so easily disposed of. The facts in this connexion are these : Both properties, lots Nos. 3 and 13, were duly attached in the execution proceedings, and the house, lot No. 13, which is the only property in which the appellant is interested, was still under attachment at the time of the sale. But the other judgment-debtor Balkisandas, had become insolvent, and on the application of the Official Assignee of the High Court the attachment on his property was raised by the executing Court on 19th December 1927. Subsequently the adjudication order was annulled, and on being informed of this the Subordinate Judge ordered the sale of the property of both judgment-debtors to proceed without there having been a fresh attachment. The question is whether under these circumstances the sale was without jurisdiction and a nullity, or whether the absence of an order reviving the attachment was merely an irregularity. In the latter case it is conceded that it would

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not be a ground for setting aside the sale, no damage having been caused to the appellant thereby.

Looking at the question apart from authority, I can find nothing in the Civil Procedure Code itself which lends much support to the view that the sale must be regarded as null and void. S. 51 which describes the powers of the Court to enforce execution in general terms says that, subject to such conditions and limitations as may be prescribed, the Court may on the application of the decree-holder order execution by attachment and sale or by sale without attachment. O. 21, R. 30, which deals with execution of decrees for the payment of money, says that such a decree may be executed by the imprisonment of the judgment-debtor or by the attachment and sale of his property, or by both. The prescribed procedure therefore is that the property should be attached before sale. But that was done in this case. Rule 64, O. 21 provides that any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold.

Attachment is not of course a mere formality. It is a notice to the judgment-debtor of the intended sale. It is also a notice to third parties who may wish to prefer claims under O. 21, R. 58. It may perhaps be argued under these provisions of the Code that the Court has no power to sell property in execution of a money decree without having first levied an attachment. But if attachment has been levied as in this case, and if the necessary notice is given to all concerned, it is difficult to see why the sale must necessarily be a nullity, merely because the attachment has ceased to be effective. The absence of a subsisting attachment would no doubt be a material irregularity. If substantial injury were caused thereby, it would be a ground for setting aside the sale on application under R. 90. But I do not think there is anything in the Code, which constrains one to hold, or makes it reasonable to hold, that it must invalidate the sale, apart from any question of damage.

The case law on the question has not been consistent, but most of the High Courts are now agreed that the omission to attach property before sale is merely an irregularity and does not ipso facto render the sale void: 57 Cal 1206 (10), 21 All 311 (11), 51 M L J 172 (5), 2 Pat 207 (7) and 1 Rang 533 (12). N. J. Wadia, J. has accepted this view, and on principle, I am inclined to agree. I do not think that 41 I A 38 (13) decides anything to the contrary, and I agree with the construction placed upon that case in 57 Cal 1206 (10). I prefer however not to express any final opinion beyond what is necessary for the purposes of the case. The property here was duly attached in the first instance. The attachment was withdrawn owing to the insolvency of the judgment-debtor and the vesting of his property in the Official Assignee. When the adjudication order was annulled, the ground on which the attachment had become ineffective ceased to hold good. That is not the same thing as saying that the attachment was revived, but the omission to revive it under the circumstances was in my opinion no more than an informality, and I think it would be most unreasonable to hold that it is a ground for setting aside the sale, when admittedly no damage had been caused to the appellant.

The difficulty is the ruling of this Court in 36 Bom 156 (4). In this case, after the property had been attached and notified for sale, the judgment-debtor paid up the decretal amount to the attaching creditor, the effect of which was that the attachment was deemed to be withdrawn under O. 21, R. 55. Other judgment-creditors who had not attached the property then applied for rateable distribution and the Court allowed their application and directed that the sale of the property should proceed. In appeal this Court set aside the sale, and Scott, C. J. observed (p. 163):

> Property can only be brought to sale after it has been duly attached, and if the attachment came to an end upon the payment into Court on 22nd September 1909, the property was not duly attached at the time of the sale in January 1910. We think this is clear from the terms of R. 55, O. 21.

If this case were clearly in point, I must say I should feel some difficulty in declining to follow it. It has been criti-

10. Nareshchandra Mitra v. Molla Ataul Huq, 1931 Cal 35=129 I C 779=57 Cal 1206.
11. Sheodhyan v. Bholanath, (1899) 21 All 311= 1899 A W N 84.
12. Ma Pwa v. Mahomed Tambi, 1924 Rang 124 =77 I C 368=1 Rang 533.
13. Thakur Barmha v. Jiban Ram Marwari, (1913) 41 Cal 590 = 21 I C 936 = 41 I A 38 (P C).

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cized adversely in some respects, as may be seen from the note in Sir Dinshah Mulla's Civil Procedure Code under S. 73, but not, I think, in respect of the finding as to the invalidity of the sale. In a later case, 44 Bom 860 (14), the question whether a sale by the Court in the absence of any prior attachment would be valid or not was expressly left undetermined.

But in my opinion 36 Bom 156 (4) does not lay down any general proposition which governs the facts of the present case. It was a case under O. 21, R. 55, which provides that attachment comes to an end when the decree is either satisfied or set aside, and in either of those events it may well be argued that the Court has no jurisdiction left to proceed further with the execution. It does not appear from the report of the case that there were any execution proceedings pending at the instance of the other judgment-creditors except an application for rateable distribution. There was a substantial question of jurisdiction involved in that case, whereas here, as far as I can see, there is nothing but a technicality. If the Court had intended to lay it down, as a general rule, that a sale in execution without a subsisting attachment is necessarily void in every case, there would presumably have been some discussion of the authorities on the point, and in particular the Privy Council cases such as 20 I A 176 (15) and 27 I A 216 (16). As it is, no reasons were given except a reference to R. 55. 36 Bom 156 (4), may therefore, be distinguished.

That being so, I have no hesitation in confirming N. J. Wadia, J's. ruling in this case.

The result is that the appeal fails and must be dismissed with costs.

Tyabji, J.—I agree.

B.D./R.K. *Appeal dismissed.*

14. Vaikunt Shridhar v. Manjunath Madhav, 1920 Bom 132=58 I C 217=44 Bom 860=22 Bom L R 640.
15. Tassaduk Rasul Khan v. Ahmad Husain, (1894) 21 Cal 66=20 I A 176 (P C).
16. Malkarjun v. Narhari, (1901) 25 Bam 337=27 I A 216=7 Sar 739 (P C).

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BEAUMONT, C. J. AND RANGNEKAR, J.

Nowroji Ardeshir Cooper — Appellant.

v.

Official Assignee, Bombay — Respondent.

O. C. J. Appeal No. 43 of 1935, Decided on 13th March 1936.

Presidency Towns Insolvency Act (3 of 1909), S. 8 (2) (b)—Appeal—Order of Judge refusing to review order made in insolvency jurisdiction is appealable.

An order of a Judge refusing to review an order made in insolvency jurisdiction is appealable under S. 8 (2) (b), and need not satisfy the conditions which would make an order in the exercise of original jurisdiction appealable : 1926 *Rang* 64 and 1928 *Rang* 246, *Dissent.* [P 321 C 2; P 322 C 2]

M. V. Desai, P. A. Mahale and *M. J. Sethna*—for Appellant.

K. B. Bharucha—for Respondent.

Beaumont, C. J.—This is an appeal from an order of Blackwell, J. made in insolvency. It appears that the insolvent was engaged in heavy litigation, and he was ordered to pay the costs, and the bill of costs was taken in for taxation. Of course it was to the interest of the Official Assignee and the estate to get the bill taxed at as low a figure as possible. The Taxing Master made his *allocatur*, and reduced the original amount at which the bill had been provisionally taxed by a considerable sum on the application of the Official Assignee. An application was then made to Kania, J. as Insolvency Judge asking him to direct the Official Assignee to take the bill of costs for review before the Judge in Chambers, and Kania, J. refused the application. Subsequently an application was made to the Insolvency Judge, who was then Blackwell, J. to review the order of Kania, J., that application being made under S. 8 (1), Presidency-towns Insolvency Act, and the learned Judge refused to review the order made by Kania, J. He considered that on the merits the Official Assignee was very unlikely to gain any advantage by challenging the taxation, because the only question in dispute was really as to quantum, and the Court does not usually interfere with the Taxing Master's discretion as to quantum. From that order of Blackwell, J. this appeal is brought, and a preliminary objection is taken that an appeal does not lie. Under S. 8 (2), Presidency-towns Insolvency Act, orders in insolvency mat-

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ters shall, at the instance of any person aggrieved, be subject to appeal "as follows", and then sub-cl. (b), which is the material one, is in these terms :

Save as otherwise provided in Cl. (a), an appeal from an order made by a Judge in the exercise of the jurisdiction conferred by this Act shall lie in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court.

Now we have been referred to two cases decided by the Rangoon High Court: 3 Rang 605 (1), and 6 Rang 363 (2), in which the Court took the view that as an appeal from a Judge exercising ordinary original civil jurisdiction would only lie in a case covered by O. 43, R. 1, or against a judgment under Cl. 13, Letters Patent of that Court, which corresponds with Cl. 15 of our Letters Patent, and as the order in question fell neither under O. 43, R. 1, nor was a judgment within Cl. 13, an appeal did not lie. I am unable to agree with that reasoning, which seems to me to involve some confusion. S. 8 gives a right of appeal from an order made in insolvency. The appeal is to be subject to the same provisions as an appeal from an order made by a Judge in the exercise of ordinary original civil jurisdiction. But that presupposes a proper appeal from such an order, that is to say, an appeal from an appealable order. Unless you presuppose a proper appeal from an order made by a Judge in the exercise of original jurisdiction, you have no standard of comparison for the order appealed against in insolvency. It is of course plain that an order made in insolvency does not fall within O. 43, R. 1, which does not deal with orders made in insolvency, and it would be very rare that an order made in insolvency, which usually does not settle any question between parties, would fall within the definition of judgment adopted in this and other Courts. In my opinion, the direction that an appeal in insolvency is to lie in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the exercise of original jurisdiction, does not import that an appeal only lies if conditions exist which would make an original side order appealable. The meaning of the words "in the same way" and "subject to the same provisions" was considered in this Court in 40 Bom 461 (3), but it is not necessary for the purposes of this case to consider the exact meaning of those words. I think the section does give a right of appeal to the appellants. (After discussing the merits of the case his Lordship concluded.) In my opinion, although an appeal lies, the appeal fails on the merits. The appeal is dismissed with costs.

Rangnekar, J.—I agree.

R.W./R.K. *Appeal dismissed.*

1. Abdul Gaffor v. The Official Assignee, 1926 Rang 64=93 I C 211=3 Rang 605.
2. Arjuna Iyer v. Official Assignee, Rangoon, 1928 Rang 246=111 I C 336=6 Rang 363.
3. Mahomed Haji Essack v. Shaik Abdool Rahiman, 1915 Bom 273 = 31 I C 507 = 40 Bom 461=17 Bom L R 989.

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RANGNEKAR, J.

Kaikhusroo Manekshah Talyarkhan—Plaintiff.

v.

Gangadas Dwarkadas and *others*—Defendants.

O. C. J. Suit No. 262 of 1929, Decided on 8th November 1935.

(a) Limitation Act (1908), Art. 48—Knowledge of plaintiff starts period of limitation—Reasonable diligence is not essential.

It is impossible upon the plain language of Art. 48 to hold that any question arises as to whether the owner of the property of the kind mentioned in that article was or was not reasonably diligent to discover in whose possession the property he is seeking to recover is. There are a good many articles in the Limitation Act in which time begins to run from the date of the plaintiff's knowledge of a particular fact or act or when certain relevant facts first became or become known to him, but in none of them has legislature imposed a condition as to the plaintiff being reasonably diligent in discovering those facts or acquiring that particular knowledge. [P 324 C 2 ; P 325 C 1]

(b) Limitation Act (1908), Art. 95—Setting aside of decree obtained by fraud—Decree must have caused loss to plaintiff.

Article 95 applies to a suit to set aside a decree obtained by fraud, or for other relief on the ground of fraud. This, it is clear, applies and must apply to a case where the plaintiff has sustained loss or damage on account of the fraud of the defendant. [P 325 C 2]

(c) Limitation Act (1908), Arts. 48, 49—Difference between—Art. 49 is residuary article—Starting point of limitation in Art. 49—When detention amounts to conversion—How wrongful detention is proved.

Article 49 must be read along with Art. 48. Art. 48 applies to a suit to recover "specific moveable property lost or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same," and the period from which

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limitation begins to run is, "when the person having the right to the possession of the property first learns in whose possession it is." Art. 49, on the other hand, applies to a suit to recover "other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same," and the period from which the limitation begins to run is, "when the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful." The word 'other' in Art. 49 is a significant word. Reading the two articles together, it is clear that Art. 49 would apply to a suit for recovery of specific moveable property which is other than the specific moveable property described in Art. 48; and if the property in suit falls within the description under Art. 48 it is clear, it would be excluded from the operation of Art. 49, which seems to be a residuary article. In other words, specific moveable property in Art. 49 must be the property which is not lost to the owner as a result of theft, or dishonest misappropriation, or conversion. The cause of action in the case is conversion. The detention of property amounts to conversion only when it is adverse to the owner or other person entitled to possession, that is to say, the defendant must have shown an intention to keep the property in fraud of the plaintiff: *Clayton* v. *Le Roy*, (1911) 2 *K B* 1031, *Ref.* [P 325 C 2; P 326 C 1]

(d) Limitation Act (1908)—Interpretation. The statute of limitation, the object of which is to prevent stale demands, must be construed strictly. [P 326 C 2]

(e) Limitation Act (1908), Art. 49—Conversion—Successive conversions give independent causes of action—One cause of action barred does not affect others—Object of Limitation Act explained.

The principle is clear that when there have been successive conversions of the same property by different persons, each of these conversions is an independent cause of action, and the barring of one of them by the statute of limitation has no effect on the others. After all, the effect of the law of limitation in respect of injuries to moveable property is merely to destroy the plaintiff's right of action but not to divest his ownership of property. Therefore if *A* converts goods belonging to *B*, it is no defence that formerly and more than three years before suit was brought they were converted by *C* also: *Miller* v. *Dell*, (1891) 1 *Q B* 468, *Ref.* [P 327 C 1]

J. H. Vakeel—for Plaintiff.
D. N. Bahadurji—for Defendants.

Judgment.—The main facts in this suit are not in dispute and raise a short but interesting question under the Limitation Act. One Dubash died in Bombay in the year 1921, leaving a will of which he appointed five persons to be the executors and trustees. He left considerable moveable and immoveable property including Government Promissory Loan Notes and Port Trust Bonds of the aggregate value of over five lakhs of rupees. The will was proved by some of the executors, and they took charge of the estate. In the course of the administration of the estate, they decided to get the Government Promissory Notes and Port Trust Bonds renewed after recovering the interest due thereon, and then to divide the same among the heirs. For this purpose they handed over these securities and bonds to one Commissariat, who was a sharebroker. The latter from time to time returned to the executors some of these securities of the face value of over Rs. 2,19,000 duly renewed together with the amount of interest due thereon. He failed to return the rest including Port Trust Bonds of the face value of Rupees 37,500, in spite of repeated demands. It is common ground that among the Port Trust Bonds which Commissariat failed to return are the three bonds in this suit.

In the meanwhile a suit was brought in this Court by two of the heirs of the deceased for administration of the estate, and a receiver was appointed. By orders made subsequently from time to time, the present Court Receiver was brought on record of that suit in place of the original receiver. In August 1925, Messrs. Mulla and Mulla on behalf of the executors lodged a complaint with the Commissioner of Police to the effect that they had reason to suspect that Commissariat, who in the meanwhile had absconded from Bombay, had committed breaches of trust after forging the endorsements and signatures on some of the securities entrusted to him by the executors, and the police started an investigation in the matter. There is voluminous correspondence before me between 13th May 1925, and 20th June 1925, which shows that the executors were leaving no stone unturned to discover the existence of the property which they had lost, and it was after they failed that they made this complaint to the police in August 1925.

The executors had some reason to think that some of these properties were lodged by Commissariat in his own account with the P. & O. Banking Corporation, and they approached the Corporation on 5th September 1925 ; and the latter, on 11th September 1925, or thereabouts, informed them that the Port Trust Bonds in suit and some other securities were

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handed over to them by Commissariat to reduce his personal liability to the Corporation. The police, on this information being supplied to them, obtained a list from the Corporation on 11th September 1925. That list shows that the bonds in suit were handed over by Commissariat to the Corporation, and the Corporation had subsequently made them over to the Bank of India. The Bank of India, when approached, admitted having held these bonds, but informed the plaintiff's attorneys that they had parted with them in favour of Chaganlal Javeri & Co. Enquiries were continued, and Chaganlal Javeri admitted having obtained the bonds in due course of business, but stated that he had sold them to one Ramdas Gangadas. All attempts of the executors to trace the said Ramdas Gangadas were unsuccessful, and all that they could do was to persist in their enquiries and call upon the police to pursue their investigation, which they did.

In 1926 some of the securities were traced and the receiver in 1926 filed a suit against Commissariat and some other parties in whose possession they were found to be. At that time the three suit bonds were not traced by the police. The suit was heard by my brother Crump, who made a decree in 1928 in favour of the Court Receiver. It appears that the suit bonds were not presented for a long time to the Port Trust for interest, although it had accrued due since 1st August 1925, and it was on 1st July 1927, that for the first time the bonds were sent by the Imperial Bank of India under a power-of-attorney from the defendants to the Port Trust for collection of interest. The endorsements on the bonds show that interest due from 1st August 1925, was paid on 1st July 1927, to the Imperial Bank on behalf of the defendants. When those who were acting on behalf of the executors found this, they wrote to the Imperial Bank of India, and on 16th August 1928, the Imperial Bank of India forwarded to them the names of the defendants and their addresses. It is under these circumstances that the Court Receiver under proper authority has filed the present suit for the return of the bonds against the defendants. On the merits there is no defence.

In the correspondence before suit, the defendants, when called upon to return the bonds to the plaintiff, at one time contended that the endorsements and signatures on the bonds were not forged and that the executors were negligent in leaving the bonds with Commissariat for a long time. These contentions were subsequently given up. But it was pleaded that the executors could in the year 1925 have by exercise of reasonable diligence ascertained with whom the bonds were lying, and that therefore limitation began to run from 1925, and the suit was barred by reason of the knowledge which the executors ought to have had in 1925. In the written statement this contention is put in a somewhat different way. In para. 6 of the written statement the defendants say that the plaintiff "could have easily learnt" in 1925 that the bonds were in the defendants' possession and without prejudice to their other contentions—which seem to me to be imaginary —that "the plaintiff was negligent and indifferent and that but for his own laches, indifference and negligence the plaintiff could have learnt in 1925 that the defendants were in possession of the bonds." I have often had to remark upon the looseness of language and vagueness of statements in pleadings in this Court, but as a loosely worded and vague pleading para. 6 of this written statement would take a high rank. On behalf of the defendants Mr. Bahadurji, who had not drafted the written statement, put forward a definite contention on which he proposed the following issue: "Whether the plaintiff could have with reasonable diligence discovered that the bonds were lying with the defendant in the year 1925."

Apart from the fact that want of reasonable diligence was not specially pleaded, it seemed to me that the issue was irrelevant and did not arise under Art. 48, Lim. Act, which it was common ground applied to the facts of the case. In my opinion, it is impossible upon the plain language of Art. 48 to hold that any question arises as to whether the owner of the property of the kind mentioned in that article was or was not reasonably diligent to discover in whose possession the property he is seeking to recover is. There are a good many articles in the Limitation Act in which time begins to run from the date of the plaintiff's knowledge of a particular fact or act or when certain relevant facts first became or become known to him, but in none of them has the legislature imposed a

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condition as to the plaintiff being reasonably *diligent in discovering those facts or* acquiring that particular knowledge.

It is not that the condition as to reasonable diligence was not known to the legislature. Thus under the Civil Procedure Code, Act 10 of 1877, a subsequent application to execute the same decree could not be allowed unless the decree-holder satisfied the Court that on the last preceding application the decree-holder had used "due diligence" to obtain satisfaction of the decree. But this was amended by Act 12 of 1879 and these words were repealed : see 6 Cal 504 (1). S. 14, Lim. Act, is the only provision in that Act that I know of in which the condition as to diligence is inserted. To accept Mr. Bahadurji's contention one would have to read into the words in the third column of the schedule under Art. 48, some such words as "when the plaintiff might with reasonable diligence have first discovered in whose possession the suit property is." These words are not there, and in my opinion there is no warrant for reading them into the article. The tendency to read something in a statute which is not there has led to a good deal of confusion and it is high time it was abandoned. I, therefore, disallowed the issue. I may here remark that neither party has led any oral evidence. Both rely on the correspondence which was read by Mr. Vakeel and practically re-read by Mr. Bahadurji. Part of this correspondence bears on the question of the alleged want of due diligence. If I had considered that the issue disallowed was relevant, I would unhesitatingly have recorded a finding on it in the negative.

The question then is whether the suit is barred by the law of limitation. I shall first set out what exactly is the contention of the defendants on the facts. The defendants contend that in 1925 the executors admittedly knew that Commissariat had by means of forged endorsements and signatures dealt with the bonds and utilized them for his own purposes, contrary to the purpose for which they were entrusted to him; that the executors knew that he was guilty of breach of trust and forgery, and as a result of their enquiries learnt in 1925 that the bonds were at first in the possession of the P. & O. Banking Corporation, thereafter in the possession of the Bank of India, *from whom they came into the possession* of Chhaganlal Javeri, and from them into the hands of the said Ramdas Gangadas. The contention then is, that as the plaintiff had this knowledge in 1925, and had then for the first time come to know that the Bank of India was in possession, the suit which is filed on 12th February 1929 is barred. The first question is, which is the article which is applicable to the suit as it is framed? Mr. Bahadurji contends that the suit would fall under either Art. 48, or Art. 49, or Art. 95. I have no difficulty in holding that the suit does not fall within Art. 95. Art. 95 applies to a suit to set aside a decree obtained by fraud, or for other relief on the ground of fraud. This, it is clear, applies and must apply to a case where the plaintiff has sustained loss or damage on account of the fraud of the defendant and that is not the present suit.

Does it then fall within Art. 49? Art. 49, I do not think it would be disputed, must be read along with Art. 48. Art. 48 applies to a suit to recover "specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same," and the period from which limitation begins to run is, "when the person having the right to the possession of the property first learns in whose possession it is." Art. 49, on the other hand, applies to a suit to recover "other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same," and the period from which limitation begins to run is "when the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful." The word "other" in Art. 49, in my opinion, is a significant word. Reading the two articles together, it is clear that Art. 49 would apply to a suit for recovery of specific moveable property which is other than the specific moveable property described in Art. 48; and if the property in suit falls within the description under Art. 48, it is clear it would be excluded from the operation of Art. 49, which seems to me to be a residuary article. In other words, specific moveable property in Art. 49 must be the property which is not lost to the owner as a result of theft, or dishonest misappropriation, or conversion. I must, therefore, hold that

1. Ashootosh Dutt v. Doorga Churn Chatterjee, (1881) 6 Cal 504=8 C L R 23.

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the only article which would apply to the facts of this case is Art. 48.

Assuming, however, that Art. 49 applies, the suit is in time. The starting period of limitation under this article is, when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful. The cause of action in this case is conversion. The detention of property amounts to conversion only when it is adverse to the owner or other person entitled to possession, that is to say, the defendant must have shown an intention to keep the property in fraud of the plaintiff: see (1911) 2 K B 1031 (2). The usual method of proving that a detention is adverse within the meaning of this rule is to show that the plaintiff demanded the delivery of the property and that the defendant refused or neglected to comply with the demand. The demand for the delivery of the bonds in this case was made in August 1928, and as the demand was not complied with, the suit was filed in February 1929, and is clearly in time. Mr. Bahadurji says that all that is necessary to be shown to defeat the plaintiff's claim is that the plaintiff first knew that the property which he had lost was in the possession of some person, and that a suit brought for recovery of the property more than three years after the date of such knowledge would be barred under this article, even though long before the suit the property may have been bona fide and legally transferred by such person to another. That is, as I understand it, the contention.

The plaintiff answers this contention by relying on the facts. These are, that until the executors had inspection of the bonds in question they could not know whether the bonds bore forged endorsements. The evidence shows that some of the securities and bonds were endorsed and signed by the executors at the request of Commissariat and for the purpose of renewals, and the executors could hardly be in a position to know that the three bonds traced to the P. & O. Banking Corporation and then to the Bank of India bore genuine endorsements or not. It was in 1928 that the bonds were seized by the police and the executors then discovered that their signatures were forged. This seems to me to be a good answer, but I am willing to consider the contention raised upon the plain meaning of the article, apart from the peculiar facts of this case. Now I am dealing with the statute of limitation, the object of which is to prevent stale demands. The statute, it is clear, must be construed strictly. What then is the meaning of the language used by the legislature when prescribing the *terminus a quo* under Art. 48.

In my opinion, the plain meaning of the article is that time begins to run against the owner of the property lost, from the time when he first discovered that it is in the possession of the defendant. The words "whose possession" mean the possession of some definite person who can be identified and against whom effective relief for restoration of the property in question can be obtained. This view, I think, is supported by the words "whose possession it is" and not it was. To accept Mr. Bahadurji's contention and to hold that if the owner of the property which he has, say, lost by theft, comes to know that the property was in the possession of *A* at some time but at the date of the suit is in the possession of *B* must sue *A* within three years even though before the suit he has to the knowledge of the owner transferred it bona fide and in the ordinary course of business to *B*, would lead to absurd results, particularly in the case of negotiable securities which pass from hand to hand almost hourly in the market. The owner in such a case has two remedies. He may sue for recovery of the specific property or he may sue for compensation, that is, for the value of it. But he is not bound to sue for both. He may confine his claim to recovery in specie. It would then be futile for him to sue *A* within three years of the date of his knowledge when at date of suit he knows the property is in possession of *B*. Obviously, this may result in considerable injury to the owner. The property may not have any value in the commercial sense or in the market and yet in his eyes it may be very precious, say an heirloom. Is he then to have no remedy of the kind he requires when he knows that although *A* was in possession at one time, he had parted with it and transferred it to *B* ?

The onus is on the plaintiff to prove that he first learnt within three years of the suit that the property which he is seeking to recover was in the possession of

2. Clayton v. Le Roy, (1911) 2 K B 1031=81 L J K B 49=104 L T 419=75 J P 229=27 T L R 206

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the defendant. In other words, he has to prove that he obtained the knowledge of the defendant's possession of the property within three years of the suit, and that is all. If he proves this, then to succeed in the plea of limitation the defendant has to prove that the fact that the property was in his possession became known to the plaintiff more than three years prior to the suit. A failure to deliver up goods on demand is not a conversion if at the time of the demand they are no longer in the power or possession of the defendant, as for instance, when they are already destroyed or consumed or have already got into the possession of some other person. No one can convert a chattel by refusing to give it up when he no longer has it. He may be liable in trover and to pay compensation, but it is difficult to see how an action for recovery of specific property can lie against him.

There is just one other point which has not been discussed before me, to which I may now turn. It is true that the executors learnt that three bonds were forged and were in possession of the Bank of India, and that later they went into possession of other persons. As I have pointed out, the executors could not be said to know definitely that they were their bonds which were forged and misappropriated by Commissariat until they had inspection thereof. Assuming however that the plaintiff knew in 1925 and thereafter within three years of the suit that the bonds had passed into the possession of several persons, what is the position? Now, the principle is clear that when there have been successive conversions of the same property by different persons, each of these conversions is an independent cause of action, and the barring of one of them by the statute of limitation has no effect on the others. After all, the effect of the law of limitation in respect of injuries to moveable property is merely to destroy the plaintiff's right of action but not to divest his ownership of property. Therefore if *A* converts goods belonging to *B*, it is no defence that formerly and more than three years before suit was brought they were converted by *C* also : see (1891) 1 Q B 468 (3). The correspondence, in this case, in my opinion, clearly shows that the plaintiff never knew of the existence of the defendants, or of the fact that they were in possession of the bonds, or even for the matter of that, of the existence of Ramdas Gangadas till 1928. That being the case, I think the plea of limitation must be rejected. I find the issue in the negative. In the result, there will be a decree in favour of the plaintiff in terms of prayers (*a*), (*b*) and (*d*). The Prothonotary to endorse and make over the bonds in suit to the plaintiff.

B.D./R.K. *Order accordingly.*

3. Miller v. Dell, (1891) 1 Q B 468=60 L J Q B 404=63 L T 693=39 W R 342.

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* A. I. R. 1936 Bombay 327

BEAUMONT, C. J. AND N. J. WADIA, J.

Emperor

v.

Nazarally V. Natterwala—Accused.

Cri. Appeal No. 465 of 1935, Decided on 11th February 1936, against order of Chief Presidency Magistrate, Bombay.

*** Electricity Act (1910), S. 47 and Electricity Rules (1911), Rr. 41, 107—S. 47 of Act cannot be used for breach of rules under Act—Owner of house with an electric installation—Workman breaking wire connexion with trowel and dying due to electrocution—Owner of house held not punishable under R. 107 or S. 47.**

Section 47 deals in terms with default in complying with any of the provisions of the Act, or with any order issued under it, or in the case of a licensee, with any of the conditions of his license, but it does not deal with a breach of any of the rules made under the Act. [P 328 C 2]

The accused owned a house having an electric installation for light. A contractor was employed to lay chunam in the house and a workman employed by the contractor in the course of his work broke through the lead sheathing of an electric wire and the rubber insulation by means of a metal trowel in his hand. He thereby brought the trowel into contact with the electric wire and being electrocuted at once died. The prosecution of the accused was under R. 41 read with R. 107, Electricity Rules, 1911. It was also contended by the prosecution that a penalty could be imposed under S. 47, Electricity Act.:

Held: that S. 47 was not intended to deal with breaches of the rules : [P 328 C 2]

Held further: that Rr. 105 and 107 imposed penalties on licensees and owners who were experts and since the accused was not owner within the meaning of the Act although he might be the owner of the defective wire in question, no penalty could be imposed for a breach of the rule; [P 329 C 1]

Held also: that there was no rule providing penalty for breach of rules by non-expert unknowingly. [P 329 C 1]

P. B. Shingne—for the Crown.

C. H. Carden Noad and *B. J. Dhondi*—for Accused.

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Beaumont, C. J.—This is an appeal by the Government of Bombay against the acquittal of the accused by the Chief Presidency Magistrate for a breach of R. 41 of the rules made under the Indian Electricity Act, 1910, as subsequently amended.

The accused is the owner of a house situate at Doctor Street, Bombay, and in July last an accident occurred in the house. It appears that a contractor was employed to lay chunam in the house, and a workman employed by the contractor, in the course of his work, broke through the lead sheathing of an electric wire and the rubber insulation by means of a metal trowel which the workman had in his hand. He thereby brought the trowel into contact with the electric wire. He was at the moment supporting himself by holding a pipe for gas, and the result was that he was electrocuted and died. The learned Chief Presidency Magistrate has held as a fact that the earth wire connexion in the electric supply line of the accused was defective; but he has not held that the accident was due to the defect, and in the absence of any evidence or finding on the point, I am certainly not prepared to assume that a workman behaving as the workman did in this case, no doubt by carelessness and not by design, would not have been electrocuted, whatever the condition of the electric supply-line might have been. However, it is admitted that the question whether the accident which occurred was due to the defect in the earth wire is really irrelevant, because the prosecution allege that the accused is liable for the defect under the rules irrespective of any consequences which may have followed from that defect. The question to be determined turns on the construction of the Indian Electricity Act, 1910, and the rules made thereunder. S. 37 of the Act enables the Governor-General in Council to make rules dealing with various matters, amongst others, providing for the protection of persons and property from injury by reason of contact with or the proximity of or by reason of the defective or dangerous condition of, any appliance or apparatus used in the generation, transmission, supply or use of energy; and under sub-s. (4) of S. 37, the Governor-General in Council, in making any rule under the Act, may direct that every breach thereof shall be punishable as therein provided. S. 38, sub-s. (4), provides that all rules made under S. 37 shall be published in the Gazette of India, and on such publication shall have effect as if enacted in the Act. Then S. 47 provides that whoever, in any case not already provided for by Ss. 39 to 46 (both inclusive), makes default in complying with any of the provisions of the Act, or with any order issued under it, or, in the case of a licensee, with any of the conditions of his license, shall be punishable as therein provided.

The learned Government Pleader has argued that if there is no rule imposing a penalty for a breach of R. 41, then a penalty can be imposed under S. 47; but in my opinion that is clearly not so. S. 47 deals in terms with default in complying with any of the provisions of the Act, or with any order issued under it, or, in the case of a licensee, with any of the conditions of his license, but it does not deal with a breach of any of the rules made under the Act. The learned Government Pleader has argued that inasmuch as the rules will have effect as if enacted in the Act, they should be treated as part of the Act. But clearly the rules are not part of the Act, and a provision giving them the same force as if they had been enacted by the Act does not make them so. It is to be noticed that when the legislature intends to deal with breaches of the rules apart from the Act they say so. For example S. 34 (2) (c) deals with an act not in accordance with the provisions of the Act or of any rule made thereunder, and S. 42 (b) provides a penalty for a breach of the provisions of the Act or of the rules made thereunder. I have no doubt that the omission in S. 47 of any reference to a breach of the rules was deliberate, because the legislature realized that the Governor-General had power in making rules to provide a penalty—an appropriate penalty—for the breach of the rules, and if he did not desire to provide a penalty in any case, then it would be wrong to impose a penalty in such case by the Act. In my opinion if the accused is to be liable for a breach of R. 41, he must be rendered liable under one of the other rules, and not under S. 47 of the Act. Now R. 41, which it is alleged that the accused has broken, is in these terms :

> Every electric supply-line shall be maintained in a safe condition, as regards both electrical and mechanical conditions, by the person to whom the same belongs.

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There is no definite finding by the learned Magistrate that the earth wire which is defective belonged to the accused, but I will assume that it did, and, therefore, the obligation imposed by R. 41 applies to the accused. We then have to see whether any penalty is provided for a breach of the obligation. Now penalties are provided by Rr. 105 to 107, and I think the argument of the learned counsel for the accused, that there is a definite policy underlying those penal rules, is right. The policy seems to be in the first place to make licensees and owners who are experts having or supposed to have some knowledge of the technical matters relating to electricity and the maintenance of electrical apparatus, liable for breaches of the rules. I should mention that an "owner" is defined under the rules as meaning a person (other than a licensee) generating, supplying transmitting or using energy to whom any of the provisions of Part 3 of the Act apply. He is a sort of quasi-licensee; a person who is not a licensee, but he is authorized by Government under Part 3 of the Act to supply energy. The present accused is not an owner within the meaning of the Act, although he may be the owner of the defective wire in question. Rules 105 and 107 impose penalties on licensees and owners (i. e. experts). Rules 106 and 106-A impose penalties on persons who are merely consumers, and not experts, and the policy with regard to them appears to be to penalise breaches of the rules which are deliberate and which any consumer can avoid. The rules, a breach of which is punishable under Rules 106 and 106-A, are Rules 29 and 40-A, which deal respectively with the breaking of a seal and the employment of experts only in the repair of electrical installations.

These are rules which any non-expert consumer can observe. But there is no rule providing a penalty for breach of rules which might easily be broken by a non-expert unknowingly. Obviously it would be extremely difficult, if not impossible, for an ordinary consumer, with no knowledge of the ways of electricity or the sort of weaknesses in the supply lines or installations which are likely to occur, to comply strictly with R. 41, and maintain all his electrical and mechanical appliances at all times in a safe condition. No doubt consumers will be well-advised, as far as possible, to comply with R. 41 and to have their electrical supply-lines properly inspected by experts. If they do not do so, they run the risk of having their buildings burnt down, or being exposed to an action for negligence, by somebody who is damaged by defective connexion, though I do not mean to suggest that mere non-compliance with the rule would be evidence of negligence. But to say that every breach of R. 41 is to be punished, would be to impose a very serious liability upon members of the public who use electrical energy for heating or lighting. The consequences which the learned Government Pleader has suggested would follow from our holding that there was no penalty imposed, for a breach of R. 41 seems to me not to be so serious as he suggests, because there are ample powers of inspection given to Government or to the licensee by the Act, and if it is discovered that any electrical connexion is in a dangerous condition, notice can be given to the consumer and an order passed upon him under S. 34 (2) of the Act, requiring him to remedy the defect: if he fails to obey the order, then penalties are imposed, if not by some special rule, then by S. 47 of the Act which covers failure to comply with orders made under the Act. In my opinion the learned Chief Presidency Magistrate was right in holding that, whether R. 41 had been complied with or not, there was no penalty imposed for a breach of the rule. That being so, the prosecution fails and the appeal is dismissed.

N. J. Wadia, J.—It was apparently admitted in the trial Court and was not disputed before us in the appeal that the supply-line which was found to be defective —and for the defect in which the accused was prosecuted—belonged to him. The prosecution originally was under R. 41 read with R. 107 of the Indian Electricity Rules, 1911. The learned Magistrate held that R. 107 could not apply to the accused, he being neither a licensee nor an owner as defined in the Act; and it is not disputed that so far as R. 107 goes, the view taken by the learned Magistrate is correct. It is contended, however, that the act of the accused in not maintaining the earth wire connection in good order would amount to an offence under S. 47 of the Act. That section provides penalties for default in complying with any of the provisions of the Act, or with any order issued under

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it, or, in the case of a licensee, with any of the conditions of his license. But the section makes no reference to default in complying with the requirements of the rules framed under the Act. It is contended that under S. 38 (4) all rules made under the Act have effect as if enacted in the Act and therefore S. 47 must be held by implication to provide a penalty for breach of the rules also. S. 37, which gives the rule making power, provides expressly in sub-cl. (4) that the Governor-General in making the rules may provide penalties for their breach, and Ch. 6 of the Rules does provide penalties for breaches of the rules not merely by licensees and owners and their agents and managers, but also in certain cases for breaches by consumers, as for instance, in Rr. 106 and 106-A. On the other hand, while S. 47 of the Act makes no reference to defaults in connection with the rules, there are some other sections which do provide penalties for breach of the rules, e. g. S. 42 (b) read with S. 34 (2) (c). It is clear, therefore, that the omission of any reference to the rules in S. 47 could not have been due to mere oversight or to the fact that the reference to the Act in S. 47 was intended to include the rules. The only inference we can draw from the fact that Ss. 34 (2) (c) and 42 (b) of the Act expressly provide a penalty under certain conditions for a breach of the rules is that S. 47 was not intended to deal with breaches of the rules. The Act is an extremely technical one and the proper performance of its requirements demands a considerable amount of technical knowledge, and the scheme of the Act appears to be not to impose penalties upon consumers or property-owners for breaches of technical requirements of the Act except after an order requiring them to comply with certain directions, and it is only the failure to obey such orders, and not the mere non-compliance with the rules, which is made punishable. R. 41 explains on whom the responsibility for maintaining the supply-line in a safe condition rests, and if that duty is not satisfactorily carried out, S. 34 (2) (c) lays down the remedy, viz. an order in writing from the Local Government specifying the matter complained of and requiring the owner of the supply-line to remedy it in such a manner as shall be specified. Admittedly no such order was issued in this case and the accused cannot be held liable to a penalty for a mere non-compliance with the requirements of R. 41. I agree that the appeal must be dismissed.

R.W./R.K. *Appeal dismissed.*

A. I. R. 1936 Bombay 330
FULL BENCH

BEAUMONT, C. J., RANGNEKAR AND DIVATIA, JJ.

Bai Saroobai—Appellant.

v.

Hussein Somji and *others* — Respondents.

O. C. J. Appeal No. 45 of 1935, Decided on 23rd March 1936.

(a) Mahomedan Law—Gift— Sunni Law—Gift of life interest is valid—(Per *Beaumont*, *C. J.* and *Divatia*, *J.*; *Rangnekar*, *J.* contra).

(Per *Beaumont*, *C. J.*, and *Divatia*, *J.*; *Rangnekar*, *J.* contra).—Under Sunni Mahomedan Law a gift of a life interest is valid ; and it does not become automatically enlarged into a gift of the corpus of the property absolutely : 1929 *P C* 149, *Expl.*; 1933 *Bom* 324, *Ref.*

[P 335 C 2; P 336 C 2]

(b) Bombay High Court (Original Side Rules) R. 23—Originating summons should not involve complicated points of law.

(Per *Wadia*, *J.*)—Questions on an originating summons should not as a rule involve difficult and complicated points of law : *In re Giles: Real and Personal Advance Co.* v. *Michell*, (1890) 43 *Ch D* 391, *Ref.* [P 331 C 1]

(c) Deed—Construction—Grant—Rule.

(Per *Wadia*, *J.*)—In order to gather the intention of the grantor and the rights of the grantee it is necessary that the instrument should be read as a whole. [P 332 C 2]

(d) Gift—Gift of rent and profits of land does not carry with it gift of entire property.

(Per *Wadia*, *J.*)—A gift of the rents and profits, without more does not carry with it a gift of the entire property. There is no doubt that under a will there can be what is called a usufructuary bequest or a bequest of the produce of the thing bequeathed. Similarly a right to enjoy the usufruct of the property during the grantee's life can also be conferred, if that is the clear intention of the grantor : 30 *All* 309 and 1928 *P C* 108, *Ref.* [P 332 C 2]

V. F. Taraporewala and *K. S. Shavaksh*—for Appellant.

P. B. Vachha, *R. S. Dixit* and *A. A. Peerbhoy*—for Respondents.

B. J. Wadia, J.—This is an originating summons taken out by the plaintiff for the determination of certain questions relating to a deed of settlement executed by one Fatmabai, widow of Elias Haji Abdul Rahim, on 10th November 1930. The plaintiff is one of the daughters of the settlor. Originally there were only

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two defendants, namely, defendant 1, who is the trustee under the deed, and defendant 2 who is the plaintiff's minor son. Under the deed two properties were conveyed by the settlor to the trustee on certain trusts for herself during her life, and after her for her two daughters Khatoobai and Saroobai, the plaintiff, and thereafter for their son or sons respectively. The originating summons came up before Blackwell, J., in Court on 11th April 1935, when counsel for the trustee argued that the questions were not such as should be raised and decided on an originating summons, and that in any event all the other heirs of the settlor were necessary parties to the summons. All the other heirs have now been brought on record under the orders of the Court, and are defendants 3 to 12. The other point as to whether this was a fit case for taking out an originating summons was left over at the time, presumably as all the parties were not before the Court. The summons came up before me on 19th June when this point was argued by counsel for defendant 1, and my attention was drawn to R. 233 of the High Court Rules which provides inter alia that any person, claiming to be interested under a deed, may apply in chambers by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the person interested. In my opinion the questions are not such as should have been raised on an originating summons. The very first question is whether on a true construction of the deed the plaintiff has become absolutely entitled to the property mentioned in the plaint from and after the death of the settlor. This does not involve merely a question of construction, but it also raises an important and difficult point of the Hanafi Mahomedan law by which the parties are governed, and should ordinarily be dealt with in a regular action. It was even argued that the plaintiff was not claiming under the trust deed but against it. Moreover, the questions on an originating summons should not as a rule involve difficult and complicated points of law: see 43 Ch D 391 (1). However, all the parties have been added and the summons has been amended. The matter was to be argued in Court, and counsel were agreed that the summons should now be heard and proceeded with in order to save further costs. I, accordingly, allowed the summons to be argued.

The important clauses of the trust deed have been set out in para. 2 of the plaint. The settlor conveyed two properties, one situate at Khetwadi Main Road, and the other at Kambekar Street, with the latter of which only we are concerned in this summons, to defendant 1 as trustee upon the trusts mentioned in Cl. 1 (a), (b) and (c) of the deed. On the death of the settlor the trustee was directed to pay net rents and profits derived from the Kambekar Street property to the plaintiff. The settlor died in or about August 1932, and the plaintiff contends that under the Mahomedan law applicable to Sunnis she has become absolutely entitled to the property. According to her the settlor intended to give her a life estate in the property with remainder to her son or sons. She contends that a vested remainder is not recognized by the Mahomedan law applicable to Sunnis, and that a life estate is also not known to the same law, and therefore the life interest granted to her is enlarged by operation of the law into an absolute estate, and her son takes nothing under it. Two points arise for consideration in relation to the first question on the summons, namely, (1) whether under the terms of the deed the settlor has given to the plaintiff a life estate in the Kambekar Street property after the settlor's death, and (2) if so, whether the plaintiff took the property absolutely, her son or sons taking nothing after her.

With regard to the first point it is necessary to construe the relevant provisions of the trust deed in order to ascertain and determine the intention of the settlor. Both the properties were conveyed to the trustee upon trust that he shall from time to time during the settlor's life time, out of their net rents and profits, pay to her such sums of money as she shall require for her maintenance and her personal requirements, but before paying to the settlor or to any beneficiary under the trust any part of the rents and profits of the properties, the trustee is to set aside a sufficient sum to pay the municipal and other taxes, rates and assessments, and to carry out all necessary repairs to the properties, and he may in-

1. In re Giles : Real and Personal Advance Co. v. Michell, (1890) 43 Ch D 391=59 L J Ch 226=62 L T 375=38 W R 273.

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vest such sum as he may not immediately require in authorized securities and apply the income of such investments upon the same trusts as are applicable to the properties. Subject to this provision for the benefit of the settlor the trustee was to hold the net rent and profits or the balance thereof upon trust to pay the same to the settlor's two daughters in equal shares as tenants-in-common. Upon the death of the settlor the trustee is to pay to Bai Khatoobai for her life the net rents and profits derived from the Khetwadi property, and to pay to the plaintiff during her life the net rents and profits derived from the property in suit. Upon the death of the survivor of the settlor and Khatoobai, and upon the death of the survivor of the settlor and the plaintiff, the trustee is to hold the properties respectively upon trust for the son or sons of the two daughters absolutely. Under Cl. 8 of the trust deed the trustee is to be at liberty with the consent of the settlor during her lifetime to sell either or both of the said properties and hold the sale proceeds upon the same trusts.

Under Cl. 9 it is provided that in the event of the settlor requiring any moneys the trustee shall be at liberty to raise such sum or sums by mortgage or charge upon either or both of the properties and without entering into any personal covenant for the repayment of the same, and for the purpose of the trust operating after the settlor's death the amount due under any such mortgage or charge was to be deemed to be charged upon the two properties in equal shares. The settlor being dead, the trustee has to pay the net rents and profits of the property in suit to the plaintiff. The question is, whether the grant of the net rents and profits derived from that property gives the plaintiff a life interest in the property. A tenant for life is one who is entitled to the benefit of the property, i. e., both the corpus and income of the property, for the term of his or her life. In order therefore to be considered a life tenant, the plaintiff must show that she got the benefit of the corpus as well as the income of the property, together with all the rights in the property which are associated with a life estate.

It was argued that this was a case of a "Hiba" or simple gift, not a bequest by a will, and that a gift may be made direct to the donee or through the medium of a trust, provided in the latter case the gift is accepted by the trustee and possession is delivered to him. It is clear that both in the case of a direct gift and a gift through the medium of a trust it is necessary that the donor or settlor must divest himself of all control over the property, so that the control may pass to the donee or to the trustee on behalf of the donee. The plaintiff's counsel contended that this was a gift or a transfer inter vivos, and the gift of the net rents and profits carried with it the gift of the entire corpus under the Mahomedan law. Under S. 8, T. P. Act, a transferor is deemed to have conveyed all that he is possessed of in the property granted, unless a different intention is expressed or necessarily implied. In order to gather the intention of the grantor and the rights of the grantee it is necessary that the instrument should be read as a whole. What is given to the plaintiff is the right to enjoy during her life the net rents and profits or the income of the property; and I do not think that the converse of the proposition laid down in S. 8 is correct, namely that a gift of the rents and profits, without more, carries with it a gift of the entire property. There is no doubt that under a will there can be what is called a usufructuary bequest or a bequest of the produce of the thing bequeathed. Similarly a right to enjoy the usufruct of the property during the grantee's life can also be conferred, if that is the clear intention of the grantor: see 30 All 309 (2). Such a transfer only of the usufruct is called "Areeat" in Mahomedan law, whereas a gift inter vivos is defined by Macnaghten to be the conferring of property without a consideration, and this definition has been accepted by the Privy Council in 52 Bom 316 (3). Can it be said that the settlor intended to confer the property in the event of her death upon the plaintiff?

Plaintiff's counsel relied on two cases. The first is 36 Cal 431 (4) in which the plaintiff sued his wife and son for a declaration that he was the absolute owner of certain Government Promissory

2. In the matter of the Petition of Khalil Ahmad, (1908) 30 All 309=5 A L J 405=1908 A W N 133.
3. Musa Miya v. Kadar Bux, 1928 P C 108=109 I C 31=55 I A 171=52 Bom 316=30 Bom L R 766 (P C).
4. Mahomed Shah v. Official Trustee of Bengal, (1909) 36 Cal 431=2 I C 292.

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Notes of the value of Rs. 37,500 in the custody of the Official Trustee. Under the trust deed the Official Trustee was to pay him the income of the promissory-notes for life, and after his death the promissory-notes were to be given to his wife and children in certain shares. It was held that the plaintiff had a life estate in the promissory notes. The second case is 7 Bom L R 306 (5), in which an immoveable property was conveyed by the settlor to trustees upon certain trusts which were enumerated, namely, to pay Rs. 50 per month to the settlor for life, and the net balance of the rents and profits were to be invested until defendant 1 attained the age of 21. On attaining that age defendant 1 was to be paid absolutely one-half of the accumulated rents and profits, and thereafter one-half of the rents and profits accruing, and the remaining half of the accumulations and profits were to be invested. Upon the death of defendant 1 the trustees were to hold the property and accumulations in trusts for the male issue of defendant 1, and if he had no male issue, then on certain other trusts. Counsel for the plaintiff in that case argued that either the whole scheme of the trust was void and there was a resulting trust to the settlor, or defendant 1 took one-half of the property absolutely. It appears that these propositions were agreed to by the other side, and it was held by the learned Judge on a construction of the words used that defendant 1 took an absolute estate in one-half of the property, as the creation of a life estate was inconsistent with Mahomedan law. The first was a case of moveable property, and the second of immoveable property, and it was pointed out that there was no difference under the Mahomedan law relating to gift of moveable and immoveable property.

Each instrument has got to be considered according to the settlor's intention and its language, and in a recent case decided by the Privy Council, 56 I A 213 (6), the legal effect of a deed of gift was considered on the construction of its terms. It was pointed out by their Lordships that the intention of the donor must be ascertained by reading the terms of the deed as a whole and giving to them the natural meaning of the language used; and upon the consideration of its terms they held that the subject matter of the gift to the wife was a life estate in the whole property together with a power to alienate a third part. In the trust deed before me all that the settlor has directed the trustee to do is to deal with the net rents and profits of the property after her death in a particular way. There are no words to show that the plaintiff was to be the owner of the property, or the "Malik," or that she was to enjoy the property. Counsel argued that the plaintiff could under the terms of the trust deed alienate the property by lease or mortgage, but that is really begging the question. The intention of the settlor was to give her the benefit of the net rents and profits during her life and no more and in my opinion such a grant, without more, does not give her all the rights incidental to a life interest in the property.

The conclusion which I have come to is sufficient to dispose of the first and most important question on the summons; but assuming that the plaintiff took a life estate in the property with all its incidents, the next question for determination is whether she took the property absolutely. It is a well-recognized principle of the Mahomedan law that when a gift is made subject to a condition which derogates from the completeness of the grant, the gift is valid, but the condition is void, and the gift takes effect as if there was no condition attached to it. When, however, the donor gives only a life estate to the donee, there is a difference between the Hanafi and the Shia law with regard to its validity. According to the Hanafi law, by which the parties are governed in this case, the grant of a life estate is viewed as a gift with a condition derogating from its completeness, the gift being valid and the condition void. The donee of the life estate takes an absolute estate, and the gift over on the termination of the life estate is void. It is, however, competent to a Hanafi Mahomedan to create life estates by way of wakf, provided there is an ultimate substantial dedication to charity. It has been held in a series of decisions of this Court that the creation of a life estate is inconsistent with the Mahomedan law, and wherever there was an attempt to

5. Abdoola v. Mahomed, (1905) 7 Bom L R 306.
6. Amjad Khan v. Ashraf Khan, 1929 P C 149 =116 I C 405 = 4 Luck 305 = 56 I A 213 (P C).

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create a life estate, it was held that the donee took the property absolutely. Doubts have arisen as to the validity of those decisions since the judgment of the Privy Council in 56 I A 213 (6), to which I have referred before. In that case a Hanafi Mahomedan made a gift of his entire property to his wife and divided it into two parts, namely one-third and two-thirds. Power was given to the donee to make any sort of alienation of the one-third at her pleasure, but as to the two-thirds it was provided that she should not possess any power of alienation, but should remain in possession of it for her lifetime. The deed of gift further provided that after the death of the donee the entire property gifted away was to revert to the donor's collaterals who were to become owners with full proprietary powers, and the heirs of the donee were not to inherit the same. It was also stated that the donee and her heirs had agreed and consented to this disposition.

The Privy Council held that upon a true construction of the deed the intention of the donor was to give a life interest only in the entire property comprised in the deed to his wife together with a power of alienation over the one-third, but they left it open whether the gift of a life estate is valid under the Mahomedan law. In a recent case, 57 Bom 737 (7), all the decisions and the case law on the subject were fully discussed in the first place by the late Mirza, J., and thereafter by the appeal Court. In that case a Sunni Mahomedan female made a will whereby she gave her property to her daughter who was to enjoy it as owner as long as she was alive, but was forbidden to alienate it by way of sale, mortgage, gift, etc., and the testatrix directed that after the daughter's death her step-son and his descendants should take the property as absolute owners. The step-son died in the lifetime of the daughter and a question arose whether the estate bequeathed by the testatrix was taken by the step-son. It was held by the Chief Justice that under the will the daughter did not take an absolute estate, that she took a like estate with remainder to the step-son, but the remainder failed to take effect as the step-son did not survive the daughter. He was of opinion that the view expressed in the earlier Bombay cases must be considered as overruled by the Privy Council, and Mirza, J. expressed the same opinion in the Court below. On the other hand Rangnekar, J. held that under the Hanafi law a life estate as such could not be recognised nor created, that the grant of a life estate to the daughter operated as a grant of an absolute estate, and that the earlier Bombay decisions had not been overruled by the Privy Council. It may be here mentioned that so far as the particular case was concerned, the result was the same under either of the views, namely, that the estate bequeathed by the step-mother was not taken by the step-son. It appears to me, however, that the earlier decisions have to this extent been overruled by the Privy Council, namely, that it has now been held that the question in each case is really one of construction of the deed of gift and that it does not necessarily follow that the life estate under the Hanafi Mahomedan law is automatically enlarged into an absolute estate, though the Board in that case left the question as to the validity of the gift of a life estate open. I agree with Rangnekar, J. that the earlier decisions have not been expressly overruled. At the same time this much can be inferred from the judgment that there is no hard and fast rule that under the Hanafi Mahomedan law a life estate is inconsistent with that law, as laid down in the earlier Bombay decisions. A reference is made in those decisions to an old judgment of the Privy Council in 17 W R 525 (8), but there it was laid down that the creation of a life estate was inconsistent, not with Mahomedan law, but with "Mahomedan usage," and that the transaction being unusual among Mahomedans must be strictly proved. In view of this difference of opinion between the two Judges of the Appeal Court, all these decisions will probably have to be re-considered by a Full Bench in order to consider the effect of *Amjad Khan's case* (6). For the present it is not necessary for me to discuss this question further on my view of the construction of the deed of settlement.

On appeal by the plaintiff:

Beaumont, C. J.—This is an appeal from a decision of B. J. Wadia, J. given

7. Rasoolbibi v. Usuf Ajam, 1933 Bom 324=148 I C 82=35 Bom L R 643=57 Bom 737.

8. Mt. Humeeda v. Mt. Budlun, (1872) 17 W R 525 (P C).

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on an originating summons. The summons raised first the question whether on the true construction of a deed of settlement dated 10th November 1930, made by one Fatmabai, the plaintiff has become absolutely entitled to the property at Kambekar Street mentioned in the plaint herein from and after the death of the settlor. The learned Judge answered that question in the negative. The other questions are merely consequential. Mr. Taraporewala for the appellant desired to amend the question by asking who were entitled, and in what shares and for what interests, to the property referred to in the question. I think that we shall have to enlarge the question to some extent, because, if respondent 1, who is the trustee of the settlement, is merely told that the plaintiff has not become absolutely entitled to the property, he is left in doubt as to whom he ought to pay over the rents and profits. I think, therefore, we shall have to amend the question by adding the words "and if not what interest in the property does the plaintiff take?" The settlement in question is in the English form, and is made by a woman named Fatmabai, who is party of the first part, the party of the other part being respondent 1 as trustee, and the settlor conveys to him two properties, one in Khetwadi Back Road, and the other, the property referred to in the question, in Kambekar Street, both of them in the town and island of Bombay. The trustee are to pay to the settlor during her life such moneys as she shall require out of the rents and profits, and subject thereto, to pay the rents and profits to the plaintiff and Bai Khatubai, who are the daughters of the settlor, and after the death of the settlor, the trustee is to pay to Bai Khatubai during her life the rents and profits of the property in Sch. 1, which was that in Khetwadi Back Road; and then come the material words:

> And the trustee shall pay to the said Bai Saroobai during her life the net rents and profits derived from the property described in Sch. 2 hereto.

Then the scheme of the settlement is that after the death of the respective daughters, the house in which she had a life interest is to be held in trust for her sons in equal shares, and in default of sons, for her daughters, and then if either the plaintiff or the other daughter of the settlor dies without issue, there is a gift over of the share of the one so dying in favour of the other daughter and her issue. So that the settlement is of a type very common under English law. But the parties here are Sunni Mahomedans, and the question is what interest the plaintiff takes under this settlement in accordance with the law applicable to Sunni Mahomedans. The learned Judge held that the plaintiff did not take technically a life estate, but that she became entitled to the usufruct of the property, and he relies on the distinction which exists under the old texts dealing with this matter between a gift of the property to one for life, and a gift of the fruit of the property. Some of the illustrations in the texts refer to the gift of the person of a slave to one person and the gift of the services of the slave to another, and point out that both those gifts may be good. But whether distinctions of that kind can be applied to modern classes of property, I feel myself some doubt. I think it is very difficult to say that, under this settlement by which the plaintiff is given during her life the net rents and profits of the house in question, she is not given the right to the house for life.

If the house were empty and the plaintiff desired to occupy it, I think myself it would be difficult to say that she was not entitled to do so, and my own view is that as a matter of construction of the settlement the plaintiff gets a life interest in the house, though I agree with the learned Judge that if all that she gets is the usufruct, the gift is perfectly valid. Now the question which has really been argued is whether, assuming that the plaintiff was given a life interest in the house, that gift will take effect according to its terms. It is argued by the plaintiff in the first place that under Sunni Mahomedan law a gift of a life interest becomes automatically enlarged into a gift of the corpus of the property. Alternatively it is said that if that is not so, then a gift of a life interest by Sunni Mahomedan law is wholly void. The question as to the effect of a gift of what purports to be a life interest under Sunni Mahomedan law came before this Court in 35 Bom L R 643 (7), and I expressed my own views on the question in that case; and as I remain of the same opinion as when I heard that case, it is not necessary for me to state my reasons again in full. It is undoubtedly the fact that it was generally

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considered that under Sunni Mahomedan law a gift of a life interest in property did confer an absolute estate in the corpus, the rule being based on a passage in the Hedaya to the effect that where there is a gift followed by a condition repugnant to the gift, the gift remains, and the condition is rejected. By way of illustration of the rule a commentator had put the case of a gift for life, which, he said, was really an absolute gift subject to a repugnant condition, and, therefore, the gift for life became an absolute gift.

As I pointed out in the case to which I have referred, the illustration does not seem really to be an apt one, and the rule itself does not appear to involve the enlargement of what is in terms a life interest into an absolute interest. However, the real question which arises in this case, and which arose in *Rasoolbibi's case* (7), is whether the Privy Council decision in 56 I A 213 (6) has altered the rule as generally understood. The view I took in *Rasoolbibi's case* (7) was that the decision of the Privy Council had so altered the rule, and having read the case again, more than once, I remain of the same opinion. It seems to me that the Privy Council unquestionably dealt with the case as one of gift. They nowhere in their judgments suggest that it was a case of a grant under a contract, although in the Judicial Commissioner's Court one of the learned Judges had suggested that possibly the grant of the life interest might be upheld on that ground. The Privy Council treat the case purely as one of gift, and they hold that on the construction of the document before them what was intended to be created was a life interest and nothing more, and on that construction they hold that the grantee, through whom the appellant claimed, did not acquire an absolute interest. That seems to me to be the actual decision at which the Privy Council arrived, and if on the construction of the settlement before us we come to the conclusion that what is granted is a life interest (and it is much easier to reach that conclusion in the present case than it was in the case before the Privy Council), but nevertheless we hold that, by the operation of the rule of Mahomedan law, that life interest is enlarged into an absolute interest, it appears to me that we shall be going directly contrary to this decision of the Privy Council. It is said that the Privy Council cannot have intended to overrule Indian cases, including decisions of this High Court, without referring to them. But all the decisions were cited. The Privy Council had before them a most elaborate judgment of the Mahomedan member of the Judicial Commissioner's Court, and the decision of the Privy Council is expressed in clear, although guarded, language. And if the decision is inconsistent with previous decisions of Indian High Courts, it seems to me that those previous decisions are necessarily overruled by implication.

On the second question, viz., whether a life interest, if not enlarged into an absolute interest, is void, *Amjad Khan's case* (6) leaves the matter open. The Board point out that if the life interest is bad, then the appellant takes nothing. If, on the other hand, the life interest is good, then it had come to an end, and again the appellant must fail. So that it was not necessary in that case to decide whether the life interest which they held was purported to be created by the document in question was a valid interest. But we have been referred to no case in which it has been held that a life interest under Sunni Mahomedan law is bad, and the case on which Mr. Taraporewala mainly relied, 17 W R 525 (8), seems to me to be an authority against him, because in that case the Privy Council were discussing what was the actual arrangement made, one view being that a life interest had been created, and the other view being that an absolute interest had been created, and the Privy Council say that as the creation of a life interest is not in accordance with ordinary Mahomedan usage, the person urging the creation of such an interest must prove his case strictly; but it is not suggested that according to Mahomedan law such an interest cannot be created. In my opinion, therefore, the learned Judge was right in answering the question raised by declaring that the plaintiff does not take an absolute interest in the property at Kambekar Street, but I think that we ought to add to that a declaration that the plaintiff takes an interest in the rents and profits of the property in Kambekar Street during her life. The question as to who will be entitled to the house on her death is a question which cannot be

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raised at the present time. Mahomedan law does not recognize vested remainders, and the question who will be entitled to the house on the death of the plaintiff is one which can only be raised when that event occurs.

Rangnekar, J.—The originating summons, out of which this appeal arises, raises an important question under the Mahomedan law. The material facts are, that one Fatmabai, widow of Elias Haji Abdul Rahim, died in August 1932. Prior to her death she executed a deed of settlement on 10th November 1930, by which she conveyed a property situated at Khetwadi to a trustee, defendant 1 here, in trust for her daughter Khatizabai, and another property situated at Kambekar Street for her other daughter Saroobai, plaintiff, upon the terms and conditions mentioned in the deed. The principal condition was that the trustee was to pay to the settlor out of the net rents and profits such sums of money as may be required by her maintenance and her personal requirements during her lifetime, after defraying the municipal and other taxes, rates and assessments and providing for the carrying out of the repairs to the properties. If any balance remained in the trustee's hand, the same was to be invested and held subject to the trusts created by the deed. Subject to this provision, the trustee was to hold the net rents and profits, or the balance thereof, to pay the same to the two daughters in equal shares as tenants-in-common, and upon the death of the settlor to pay to Khatizabai the net rents and profits from the Khetwadi property, and to pay to the plaintiff the net rents and profits from the Kambekar Street property. Upon the death of the survivor of the settlor and Khatizabai or Saroobai the trustee was to hold the properties upon trust for their son or sons. Cl. 9 provided that in the event of the settlor requiring any moneys, the trustee was at liberty to raise the same by a mortgage or charge upon both the properties. On these facts the present originating summons was taken out by Saroobai, the appellant. It is admitted that on the execution of the deed, the trustee was put in possession of the properties. All the parties interested in the two properties, including Khatizabai, were joined as parties to the summons. The parties are Sunni Cutchi Memons, and it is common ground that they are subject to the Hanafi school of Mahomedan law, and that the deed of settlement has to be construed according to the principles of that law.

The questions raised before the learned Judge were: Whether on a true construction of the deed, the plaintiff has become absolutely entitled to the property at Kambekar Street and whether defendant 1, the trustee, should be ordered to convey the said property to the plaintiff and put her in possession thereof. The learned Judge held that there was a gift of the usufruct of the properties in favour of the daughters, but assuming there was a gift of a life estate, the gift was good; and it is from this judgment that the present appeal is taken. It is contended before us, first, that the gift is not a gift of usufruct, but if it is, the gift is void, and there will be a resulting trust in favour of the settlor's heirs. In that case, the succession would admittedly be governed by the rules of Hindu law, and the properties will go to the sisters in equal shares as tenants-in-common. The next contention is, that it was a gift of a life estate, and as a life estate is not known to Mahomedan law, or is inconsistent with it, the gift operates absolutely in favour of the donees. Before dealing with these contentions, I shall first refer to another contention taken by the learned counsel on behalf of the appellant. He relies on Cl. 9 of the deed of settlement, and contends that the donor has reserved an interest in the property for her benefit, and that being so, the gift fails altogether and a resulting trust must ensue. Under the Mahomedan law, it is no doubt essential to the validity of a gift that the donor should divest himself completely of all ownership and dominion over the subject of the gift. But the clause, in my opinion, does not show that this condition is not complied with. All that the clause provides is, that in the event of the settlor requiring any moneys, the trustee may, if he likes, mortgage or charge the properties for the benefit of the donor. There is nothing in the trust deed, as a whole, which shows that the trustee would be bound to mortgage or charge the properties or to sell them for the benefit of the settlor, and I think the deed read as a whole clearly shows that the settlor had completely divested herself of the ownership of the properties on

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the execution of the deed, and admittedly she had put the trustee in possession.

The question then is, what is the nature of interest taken by the appellant in the property at Kambekar Street? Under the Mahomedan law, a gift may be made through the medium of a trust. The same conditions are necessary for the validity of such a gift as those for a gift to the donee direct with this difference that the gift should be accepted by the trustees and possession also should be delivered to the trustees. Another principle of Mahomedan law is:

> A gift cannot be made of anything to be performed *in futuro*, nor can it be made to take effect at any future period whether definite or indefinite: see Mulla's Mahomedan Law, Edn. 10, p. 121, S. 136.

The learned author then at p. 122 observes as follows:

> The rule set forth in this section is based on the principle that the object of the gift must be in existence at the time of the gift.

The distinction is made clear by the learned author in these words:

> Where property is transferred by way of gift, and the donor does not reserve dominion over the corpus of the property nor any share of dominion over the corpus, but stipulates simply for and obtains a right to the recurring income during his life, the gift and the stipulation are both valid. Such a stipulation is not void, as it does not provide for a return of any part of the corpus as in S. 138 Illus. (b) and (c). The stipulation may also be enforced as an agreement raising a trust, and constituting a valid obligation to make a return of the proceeds during the time stipulated: Mulla's Mahomedan Law, Edn. 10, p. 123, S. 139.

This distinction is supported by the observations of their Lordships of the Privy Council in 11 M I A 517 (9). The clause which calls for construction in the present case is in these terms:

> Upon the death of the settlor the trustee shall pay to the said Bai Khatubai during her life the net rents and profits derived from the property described in Sch. 1 hereto, and the trustee shall pay to the said Bai Saroobai during her life the net rents and profits derived from the property described in Sch. 2 hereto.

As a matter of construction, I am unable to hold that there was a gift of the usufruct merely in this case. I cannot see any distinction between giving a property to *A* for life, and giving him the rents and profits for his absolute benefit during his lifetime. In my opinion, the gift in this case is of a life estate. But if it is a gift of usufruct, then I have no doubt that as such it would be entirely contrary to the principles of Mahomedan law. If so, I have no doubt there would be a resulting trust in favour of the settlor's heirs, who in this case would undoubtedly be the two sisters. This brings me to the real question which has been argued at length in this case. The question is, whether under the Hanafi school of Mahomedan law it is open to a Mahomedan to create a life estate, and if he purports to create a life estate, whether the result would not be to make the donee the absolute owner of the property granted to him. The same question arose before us in 57 Bom 737 (7). In that case it was held by the trying Judge, Mirza, J., upon a review of the material texts and the cases from the very earliest times beginning with the case in 17 W R 525 (8) that according to the Hanafi school of Mahomedan law there cannot be a gift of a life estate as such, and if a Mahomedan purports to make such a gift, "the gift is valid and the condition is void," so that the result is that the donee would take an absolute interest in the property, the subject matter of the gift. The learned Judge, however, thought that the decisions including those of the Privy Council clearly laying down these principles were overruled by the decision of their Lordships in 56 I A 213 (6). In appeal the question was exhaustively argued, and I came to the conclusion that there was nothing in the judgment of their Lordships which in any way showed that their Lordships were overruling a long train of decisions, not only of the Courts in this country but of the Privy Council itself. Since then, and during the course of the discussion in this case, I have carefully considered that judgment more than once, and I see no reason to depart from the opinion which I expressed in *Rasoolbibi's* case (7) that 56 I A 213 (6) did not overrule the earlier decisions. I do not propose to discuss the view, which has been pressed upon us by the learned counsel for the appellant, that the decision in *Amjad Khan's* case (6) is also capable of being understood on the footing that it was a case of a family settlement, though I am not prepared to say that there is no force in the argument advanced by the learned counsel. I am content to take the judgment as it stands; and, in my opinion, the

9. Nawab Umjad Ally Khan v. Mt. Mohumdee Begum, (1867) 11 M I A 517=17 W R 25 (P C).

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judgment proceeded on the terms of the document before their Lordships, one of which was that all the persons interested in the property, namely, the heirs of the donor, were consenting parties to the arrangement which the donor had made. I find support for this view in the judgment of one of the Judicial Commissioners from which the appeal was taken to the Privy Council. What he said as to this part of the case I have set out in my judgment in *Rasoolbibi's* case (7), and I do not propose to refer to it here. I may however refer to the argument which seems to have found favour with the learned Judge, and repeated before us by the learned counsel on behalf of the respondents.

It is said that all that was said by the Privy Council in 17 W R 525 (8) was that the grant of a life estate was inconsistent with Mahomedan usages. As far as I can see, there is nothing in the report of the case to show that any one contended that the effect of the arrangement between the parties there (mother and son) was to give the mother a life estate and that the life interest was consistent with Mahomedan usages. The simple question was, whether, under the arrangement, the mother took a life estate or an absolute estate. Their Lordships directed their attention to this question and observed that a life estate was inconsistent with Mahomedan usages and unknown to Mahomedan law. It is true that the Privy Council further observed that there ought to be very clear proof of a transaction so unusual and so improbable amongst Mahomedans. This latter observation however loses its force when it is remembered that under the statute then applicable (21 George III, c. 70), it was provided that in the case of Mahomedans

> their inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of the Mahomedans, by the laws and usages of Mahomedans and, in the case of Gentoos, by the laws and usages of Gentoos.

It may be, as Mirza, J. said in 57 Bom 737 (7) that the statement of their Lordships was in the nature of an obiter dictum. It is important to note however that *Humeeda's* case (8) was understood in several decisions including those of the Privy Council as laying down the principle that the creation or grant of a life estate among Sunni Mahomedans is inconsistent with Mahomedan law. There is nothing surprising in this, for thus runs the Hedayah, Vol. 3, p. 309 :

> An *amree* or life-grant is lawful to the grantee during his life, and descends to his heirs.

The question is not whether this law is wise or foolish, nor it is a question of the policy of the law, or whether it is repugnant to modern usages. The only question is, what is the law? That I get from a series of decisions, some of which are those of the Privy Council itself. I have to administer that law. I am bound by those decisions and bound by the texts on which they are based. In this connexion I would like to quote the words of that venerable Judge, Sir William Jones, at whose instance the statute above referred to as well as the subsequent Regn. 4 of 1793, S. 15, by which the Mahomedan law was to be applied to Mahomedans, came to be enacted. In his letter to the Government of India he observed :

> Nothing could be more obviously just than to determine private contests according to those laws, which the parties themselves had ever considered as the rules of their conduct and engagements in civil life ; nor could anything be wiser than by a legislative Act to assure the Hindu and Mussalman subjects of Great Britain, that the private laws, which they severally hold sacred, and violation of which they would have thought the most grievous oppression, should not be suppressed by a new system, of which they could have no knowledge and which they must have considered as imposed on them by a spirit of rigour and intolerance : vide footnote at p. 72 of Sircar's Mahomedan law, Tagore law Lectures, (1873), Vol. 1.

Even in *Amjad Khan's* case (6) the decision in *Mt. Humeeda's* case (8) was cited and distinguished as being inapplicable to the facts. I am further supported in the conclusion to which I came in *Rasoolbibi's* case (7) by the discussion which took place in the course of the arguments in 36 C W N 774 (10). To appreciate the importance of this discussion, it is necessary to bear in mind that according to the law applicable to Shias, a life estate as such can be created, and vested remainders are also recognized. This was pointed out in 32 Bom 172 (11) by Sir Lawrence Jenkins. In this respect the Shias rely on certain texts of their own. 36 C W N 774 (10) was a Shia case.

10. Syed Mohammad Raza v. Mt. Abbas Bandi Bibi, 1932 P C 158=137 I C 321=59 I A 236 =7 Luck 257=36 C W N 774 (P C).
11. Banoo Begum v. Mir Abed Ali, (1908) 32 Bom 172=9 Bom L R 452.

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Sir Lancelot Sanderson who delivered the judgment of the Privy Council in *Amjad Khan's* case (6) was a member of the Board. In the course of discussion *Amjad Khan's* case (6) was cited. It was argued that the creation of a life estate is void under Mahomedan law, and when one was attempted to be created the donee would take absolutely. Then the cases which are referred to in *Rasoolbibi's* case (7) were cited. Sir George Lowndes then observed (p. 777) :

On this point, the Shia law, by which the parties here are governed, differs from the Sunni law.

Then, later, counsel referred to 17 I A 201 (12), and argued that that was a case of a hiba-bil-ewaz. Lord Tomlin questioned (p. 777) :

Does the rule of Muhammadan law as to conditions, etc., apply only to gifts ?

The counsel said :

Yes.

Then Lord Tomlin observed :

Then clearly the rule cannot apply here. It was a compromise for consideration.

Then at p. 778 Sir George Lowndes observed :

It is a very well-known doctrine of Muhammadan law that there is no such thing as an estate for life.

Then counsel relied on *Amjad Khan's* case (6). Lord Tomlin observed as follows (p. 778) :

If on the true construction of the compromise, the lady took only a life-estate, then if Shia law is to be applied, you are out of Court. Jenkins, C. J.'s judgment in *Banoo Begum's* case (11) clearly points to a distinction between the Sunni and the Shia law, and is supported by the authority of the texts he cites.

These observations of some of the members of the Board, I venture to think, support the view I took of the decision in *Amjad Khan's* case (6) in *Rasoolbibi's* case (7), and I still remain unconvinced that the decision in the former case overruled the long train of decisions of the Privy Council itself. For these reasons, I would answer the question in the affirmative.

Divatia, J.—The question in this case is what interest the plaintiff, who is a Sunni Mahomedan, takes under a trust deed. The provision about her is that the trustee shall pay her during her life the net rents and profits derived from a certain house. Her case is that she takes an absolute interest in the property under this clause on the ground that under the Sunni Mahomedan law, a life interest is enlarged into an absolute interest, and that in the alternative, if the life interest is not so enlarged, it is void and the property falls into the residuary estate of the settlor. The learned Judge has held that what is given to the plaintiff is only the usufruct or the income of the property during her lifetime and no more, i.e., neither a life estate nor an absolute estate in the property itself. The main argument urged on behalf of the plaintiff-appellant is that what is given to her being a life estate in the property, it enlarges itself into an absolute estate as, under the Sunni law, the enjoyment for life only is a condition which must be disregarded as repugnant to the grant which must prevail as an absolute one. The first question is whether the grant to the plaintiff is one of usufruct only in the property during her lifetime and whether as such it is valid. There is no doubt to my mind that under the Sunni law, a valid gift confined to the usufruct of a property for a limited period could be made and that such a gift is not bad on the ground of being *in futuro*. It is open to a donor to carve out the usufruct of the property gifted to another person and to reserve the enjoyment of that usufruct either for himself during his lifetime or to grant it to another person for his life. In such a case the gift of the usufruct as well as that of the corpus are both valid : 11 M I A 517 (9), 49 I A 195 (13), 41 Bom 372 (14), 34 All 478 (15) and 28 All 264 (16), read with 30 All 309 (2). The plaintiff's case however is that the gift of the income of the property during life is gift of a life-estate in the property itself. This contention seems to be based on the analogy of the principle embodied in S. 172, Succession Act, which says :

Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration the principle as well as the interest shall belong to the legatee.

12. Umesh Chunder Sircar v. Mt. Zahoor Fatima, (1891) 18 Cal 164 = 17 I A 201 = 5 Sar 507 (P C).

13. Mohammad Abdul Ghani v. Fakhr Jahan Begam, 1922 P C 281=68 I C 251=49 I A 195=44 All 301=25 O C 95 (P C).

14. Tavakalbhai v. Imtiyaj Begam, 1916 Bom 104=39 I C 96=19 Bom L R 97=41 Bom 372.

15. Lali Jan v. Muhammad Shafi Khan, (1912) 34 All 478=16 I C 105=9 A L J 798.

16. Mumtaz-un-nissa v. Tufail Ahmad, (1905) 28 All 264=1905 A W N 269.

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And illustration (iii) says :

A bequeaths to *B* the rents of his lands at X. *B* is entitled to the lands.

The argument is that just as bequest of income carries with it the bequest of the property itself, so the grant of income of a property for life carries with it the grant of the property itself for life and creates a life-estate in it. In the first place this section which embodies a rule of construction of wills under the English law does not apply to Mahomedans : see S. 58 of the Act. The Mahomedan law has its own provisions about gifts limited to the usufruct of the property, one form of which is 'ariat' under which a person acquires only a right to the profits of a property for a limited period. Secondly, even assuming that the section applies to the case of a Mahomedan, the present case does not, in my opinion, fall under that section because the trust deed does afford an indication of an intention that the enjoyment of the grant in the plaintiff's favour was to be of limited duration. The gift is made through the medium of a trust deed which is couched in language used in English forms of conveyancing, but that would not necessarily attract the application of technical rules of English law. Read as a whole, the trust deed indicates, to my mind, the intention of the settlor that the plaintiff should have only a life interest in the net income of the property, and that being a valid gift, I agree with the learned Judge that the plaintiff does not get an absolute interest in the property.

Assuming the intention is to give the plaintiff a life-estate in the property, I am of opinion that such estate does not enlarge itself into an absolute estate. It is true that for a long time it had been considered to be the Sunni law that the creation of a life-estate was prohibited and that it being regarded as a condition repugnant to the law, the grantee takes an absolute estate, though it may defeat the intention of the grantor. There are observations to that effect in 13 Bom 264 (17) and 7 Bom L R 306 (5). These observations seem to be based upon an old decision of the Privy Council in 17 W R 525 (8), and a passage from the Hedaya, but they seem to me to be too slender a foundation for raising the structure of the subsequent case-law upon them. In *Mt. Humeeda's* case (8) their Lordships observe at (p. 527):

The creation of such a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction.

That does not necessarily imply that a life-estate was absolutely prohibited under the Mahomedan law. The Hedaya says that an Amree or life-grant was "nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition." The condition implied is that the subject matter of the gift is to be returned on the donee's death. But a gift subject to such implied or express condition does not seem to me to be the only method of creating a life-estate. What was regarded in ancient times as possible only by imposing a condition could also be done by putting a limitation so as to carry out the intention of the grantor. At any rate the contention that the intended life-estate enlarges itself into an absolute estate, seems to be untenable now after the recent decision of the Privy Council in 56 I A 213 (6). There a life-estate was intended to be created by a deed and it was expressly contended on behalf of the donee's heir that the deed constituted a valid gift of an absolute interest in the property as under the Hanafi law the condition that the donee should take the property for life would be void and there would be a complete and absolute gift of the property. That contention was negatived and the judgment proceeded on the basis that the donor intended to make a gift of a life-interest only, and that if a life-interest could be acquired under the Mahomedan law, that interest came to an end on the death of the donee with the result that the plaintiff claiming as her heir had no title to the property, and that in the alternative, if a life-estate could not be acquired, even then the donee and therefore the plaintiff took nothing. If the donee took an absolute interest, the plaintiff could have acquired title to the property as her heir and his appeal would have succeeded. That point therefore did arise for decision. But in spite of the plaintiff's arguments to that effect in both the Courts and in spite of the elaborate discussion of that point in the judgments of the two learned Judges in the lower Court, the Privy Council negatived his contention about the ac-

17. Nizamudin Gulam v. Abdul Gafur, (1889) 13 Bom 264.

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quisition of an absolute interest and proceeded to consider whether he would get anything on the basis of the creation of a life-estate. This decision therefore has, in my opinion, the effect of overruling all previous cases which hold that the grant of a life-estate has the effect of creating an absolute interest in the property which can pass on to the heirs of the donee. It is true that in that decision the question that under the Hanafi law a life-estate could not be created and that there could not be a transfer of any interest by way of gift except an absolute interest was kept open. But I do not think either the texts or the authorities go so far as to hold that the creation of a life-estate is so repugnant to Mahomedan law that it would be absolutely invalid. If a life-interest in the usufruct of the property is valid under that law, as I have shown above, one fails to see why a gift conferring the enjoyment of a property by a donee limited during his life should be regarded as absolutely prohibited and therefore void. In the absence of a clear and unambiguous prohibition, I am reluctant to hold that a life-estate could never be granted. For these reasons, I am of the opinion that the plaintiff has not become absolutely entitled to the property but is entitled to the net rents and profits derived therefrom during her lifetime.

Per Curiam.—We vary the learned Judge's judgment by declaring that on the true construction of the settlement the plaintiff has not become absolutely entitled to the property at Kambékar Street in Bombay, mentioned in the plaint, but is entitled to the net rents and profits derived from such property during her lifetime. Otherwise the appeal to be dismissed. Costs of all parties of the appeal to come out of the trust estate, those of defendant 1 being as between attorney and client.

V.B./R.K. *Judgment modified.*

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BROOMFIELD AND TYABJI, JJ.

Balmukundas Pranjivandas Dasai — —Appellant.

v.

Bai Dhanlakshmi—Respondent.

First Appeal No. 186 of 1930, Decided on 11th March 1936, from decision of First Class Sub-Judge, Broach, in Suit No. 74 of 1929.

Civil P. C. (1908), S. 35 — Suit brought without necessity—Defendant never denying liability—Defendant bringing money in Court —Costs should not be saddled on defendant.

Plaintiff brought a suit against the defendant basing his claim on a pronote executed by the defendant in favour of the deceased husband of the plaintiff. Defendant never denied his liability but only asked the plaintiff to produce a succession certificate or some such order of the Court entitling her to recover this debt. The plaintiff did not do any such thing but brought the suit. Defendant took with him the amount due in the Court and paid it to the plaintiff:

Held: that under such circumstances costs should not be saddled on the defendant. [P 343 C 2]

R. J. Thakor and *I. B. Desai* — for Appellant.

H. D. Thakor—for Respondent.

Tyabji, J.—The suit out of which this appeal arises was based on a promissory note dated 7th June 1926. The promissory note had been executed by the defendant in favour of the deceased husband of the plaintiff. The defendant at the time of the hearing of the suit did not dispute his liability to pay the amount of the promissory note. On the contrary he had brought in the Court the whole amount less Rs. 247-8-0. He did dispute his liability to the extent of Rs. 247-8-0 which represented interest on the principal sum for one year, but he agreed to pay this amount, if the plaintiff stated on oath that it had not been received by her deceased husband. She took the oath and accordingly there was a decree for payment of Rs. 247-8-0 by the defendant. The only question before us is whether the learned Judge was right in ordering the defendant to pay the costs of the suit on the promissory note; and whether the order for payment of the costs was based on a correct appreciation of the nature of the liability to pay a debt due to a deceased creditor and of the significance of a defendant depositing in Court a sum of money in satisfaction of the claim.

The position at the time when the suit was brought was this: The creditor of the defendant had died, leaving a widow and daughters. There was an administration suit pending between the widow and daughters, viz. Suit No 375 of 1928. There was a will left by the deceased creditor. The plaintiff was not the executrix under the will. The attitude that the defendant took up was on the basis that in these circumstances it was not safe for him to pay the debt which he admitted to be due. He expressed his

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willingness to pay it provided the plaintiff or any other person obtained a succession certificate in regard to the debt. The defendant also stated in a letter dated 9th February 1929, (Ex. 37), that if there were an order of the Court in the administration suit, he would be willing to pay the debt. It does not appear to us that the attitude taken up by the defendant was erroneous in law. It shows no desire to avoid paying the debt.

The learned Judge nevertheless has made the costs of this suit payable by the defendant. He does so mainly on two grounds. He states first that the defendant failed in his duty to deposit money in Court in the administration suit No. 375 of 1928. The defendant was not a party to the administration suit. It is not shown to us how the defendant could have paid the money in Court in a suit to which he was not a party. The only provision on which reliance is placed in this respect is Order 24 of the Civil P. C. That order refers to payments in Court by the defendant in the suit. Then it is argued with reference to the administration suit that the defendant could have paid the amount to the receivers in that suit; but it is not shown to us that the receivers were authorized to receive any money or to recover the amount from the defendant. The defendant offered to pay the amount to the receivers provided they got an order from the Court authorizing them to receive the money. Neither the plaintiff nor the receivers in that suit took any such steps. Ultimately when the plaintiff herself was appointed receiver in the administration suit, the order was not (as the defendant had suggested) that she should be allowed to receive the money from the defendant and to give a valid discharge for it, but that she should be authorized as receiver to prosecute the suit against him and to realize the amount.

The second ground taken by the learned Judge is that in the suit, out of which the present appeal arises, the amount ought to have been paid by the defendant into Court earlier. But the suit was brought by the plaintiff, who was a widow, in the circumstances that I have already stated without having obtained a succession certificate. There was already an administration suit pending in reference to the estate. In such a suit based on a debt due to the estate, there is no duty on the part of the defendant to bring the money into Court. Until the plaintiff obtains a succession certificate or obtains other forensic recognition, he is not entitled to a decree under S. 214, Succession Act. Until the receiver in the administration suit was made a party to the present suit, there was admittedly no one in the present suit entitled to obtain a decree against the defendant in respect of this debt. To say that there was a duty upon the defendant to pay the sum in Court when there was no one entitled to a decree for payment of the sum, seems to proceed on a total misapprehension of the position. The learned Judge mainly on these two considerations has come to the conclusion that the defendant did not really intend to pay the money that was due from him, but, as he calls it, "it was a mere bluff." The facts as they appear on the record seem to indicate exactly the reverse. The defendant seems to have acted in a perfectly honourable manner. He never denied his liability. It was the plaintiff and those responsible for the administration of the estate of her deceased husband who never understood the steps they had to take for being empowered to give a valid discharge to the defendant.

The plaintiff brought a suit which was quite unnecessary. Ultimately it was in some form amended so as to enable or induce the Court to make an order against the defendant for payment of the debt in question. The defendant pointed out two much easier alternatives, neither of which was availed of. In these circumstances it would be very unjust to make the defendant bear the costs of an unnecessary suit which was only brought because the persons entitled to claim under the deceased creditor did not understand their legal rights. The defendant's advocate does not press for his own costs in the first Court. Under the circumstances our order will be to allow the appeal with costs and to order that the parties should bear their own costs in the first Court. The decree for Rs. 247-8-0 in favour of the plaintiff will stand.

B.D./R.K. *Appeal allowed.*

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A. I. R. 1936 Bombay 344

BEAUMONT, C. J. AND RANGNEKAR, J.

National Petroleum Co. Ltd.—Defendants—Appellants.

v.

Popatlal Mulji — Plaintiff — Respondent.

O. C. J. Appeal No. 44 of 1935, Decided on 11th March 1936.

(a) Contract—Construction—Joint promise —Promisee choosing to proceed against one of co-promisors and obtaining judgment—He cannot proceed against other co-promisors.

Where a promisee chooses to proceed against one co-promisor, and obtains a judgment, he has no right to proceed against the other co-contractors or co-promisors. [P 345 C 2]

A transferred his business to *B*, the latter undertaking as part of the consideration to pay, satisfy and discharge all debts and liabilities of *A*. *P* who was *A's* selling agent brought a suit against *A* and *B*, claiming certain sum of money as being due from *A* and obtained judgment for the amount against *A*:

Held: *P* having elected to prove his claims against *A* to judgment had abandoned any claim he preferred against *B*: *Scarf* v. *Jardine*, (1882) 7 *A C* 345 and *Moral Brothers & Co. Ltd.* v. *Westmorland* (*Earl of*), (1904) *A C* 11, *Rel. on.* [P 345 C 2]

(b) Contract — Right to sue—Person not party to contract cannot sue upon it—Cases of person in position of cestui que trust and of principal suing through agent are exceptions to the rule (*Obiter*).

Obiter.—A person who is not a party to a contract is not entitled to sue on the contract except in the special cases of a person in position of a cestui que trust or a principal suing through an agent: 1930 *Mad* 382 (FB) and 34 *All* 63 (PC), *Foll*,; 1934 *Cal* 682, *Dissent.* 1914 *Cal* 129, *Disting.*; *Case law discussed.* [P 346 C 1,2]

(c) Trust — Constructive Trust — Selling agent of person depositing money with him as security—Deposit is mere debt and not money held in trust.

Where a person enters into a contract of agency with a person carrying on business and deposits with the principal a certain sum of money as security according to the terms of the agreement, the obligation to return the deposit is a mere obligation in contract i. e., a mere debt and the money cannot be said to be held in trust for the agent: 1932 *Bom* 311 and 1914 *Bom* 118, *Ref.* [P 347 C 1]

Jamshed Kanga and *M. V. Desai*—for Appellants.

K. M. Munshi and *N. H. Bhagvati*—for Respondent.

Beaumont, C. J.—This is an appeal from a decision of Chitre, J., in which the main issue raised was whether the plaint showed any cause of action. The learned Judge held that it did, and the question is whether he was right in so holding. The material facts are these. Defendant 2 carried on business under the name of the National Petroleum Company, and he entered into contracts with the plaintiff and others as selling agents. The contract with the plaintiff is dated 22nd April 1933, and thereunder the plaintiff was appointed selling agent on behalf of defendant 2. By Cl. 3 the selling agent agreed to indent for goods required by him and to pay to defendant 2 against railway receipts or shipping documents the market value of the goods as fixed by defendant 2 at the time of delivery. Under Cl. 15 the plaintiff, as selling agent, had to deposit with defendant 2 a sum of Rs. 1,000, which was to be returned to the plaintiff on termination of the agreement. In the meantime the deposit was to carry interest at the rate of six per cent. if made in cash, but if made in Government Securities, the actual interest collected from such securities was to be paid to the plaintiff. Defendant 2 was to be entitled to utilise and use the deposit whether in cash or in Government Securities. The plaintiff duly made his deposit of Rs. 1,000 which is one of the sums for which he sues. There was also at the date of the commencement of the suit a sum of Rs. 3,649 due to the plaintiff under the agreement in respect of the balance of moneys due to him in manner mentioned hereafter. On 21st May 1934, the first defendant company was formed, and it became entitled to commence business on 17th July. On 5th June 1934, an agreement was entered into between defendant 2 and defendant 1 by which all the assets of defendant 2 were assigned to defendant 1. The sale was to take place, so far as the Bombay business was concerned, as from 1st April 1934. The consideration consisted partly of cash and partly of shares in defendant 1, and as the residue of the consideration for the sale the company, that is defendant 1 undertook to pay, satisfy and discharge and fulfil all debts and liabilities, so far as the Bombay business was concerned, from 1st April 1934, contracts and engagements with defendant 2, and to indemnify him against all proceedings, claims and demands in respect thereof.

On 21st June 1934, the plaintiff gave notice terminating his selling agency agreement, and shortly after that he demanded from defendant 1 the return of

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his deposit of Rs. 1,000 and payment of the balance due to him on account. On 16th November, he filed this suit as a summary suit. On 21st January 1935, defendant 1 was granted unconditional leave to defend, but on 15th February a decree was passed for the full amount claimed in the plaint against defendant 2.

In the plaint the plaintiff alleges that defendant 1 had taken over the business and liabilities of defendant 2, and that the latter was indebted to the plaintiff in a sum of Rs. 3,649 odd. Then it is alleged that defendant 1 company had made up accounts with the plaintiff and sent to the plaintiff a statement duly checked and certified by their auditors; and the prayer is against both defendants for payment of the sum of Rs. 3,649 and the deposit of Rs. 1,000. But the plaintiff does not specify under what legal principle he claims a right to sue defendant 1. Apparently he bases his case on an equity that defendant 1, having taken over the business and assets of defendant 2, and having covenanted with defendant 2 to discharge all the liabilities of defendant 2, one of which liabilities was to the plaintiff, the plaintiff thereby became entitled to sue defendant 1 for the amount due. But it is to be noticed that no case of novation is made out in the plaint, and in view of the fact that the plaintiff had taken judgment against defendant 2, no case of novation could have been made out at the trial; and it is also to be noticed that no case of estoppel is pleaded, and no case of any independent contract, express or implied, by defendant 1 with the plaintiff. Plaintiff rests his case on his equitable right to sue for the money on a contract to which he was not a party, but under which he took an interest, and the learned Judge decreed in favour of the plaintiff.

The first point taken by the appellants is that under the agreement of 5th June 1934, defendant 1 only covenanted to pay the debts of defendant 2 arising after 1st April 1934. The language of the agreement in this respect is certainly open to doubt. The purchasing company was taking over the vendor's business as from 1st April 1934, and as from that date, therefore, defendant 1 would necessarily be liable for the debts of the business, because it was his business, and it is impossible to say that an obligation to pay those debts formed part of the consideration for the sale, and yet the obligation to pay the debts of the vendor is expressed to be part of the consideration for the sale. It is also to be noticed that the obligation to discharge the contracts and engagement of the vendor is not limited in point of time by the terms of the agreement. Taking the agreement as a whole, I think it does amount to a contract by defendant 1 to pay all the debts and liabilities of defendant 2 in respect of the business assigned. It is, I think, the ordinary type of agreement for purchase entered into by a company formed to acquire a going concern. The questions which then arise are, first, whether the plaintiff can sue on this agreement to which he was not a party, but under which he took a benefit, and secondly, if he can so sue, whether in taking judgment against defendant 2 he precluded himself from proceeding further against defendant 1. I will take the second point first, and will, for the moment, assume that the plaintiff had a right to sue defendant 1 under this agreement. If that is so, the obligation which he could enforce under the agreement would be the obligation of defendant 1 to pay the debt of defendant 2 to the plaintiff, and it seems to me plain that the moment the plaintiff took judgment against defendant 2, and thereby destroyed the debt of defendant 2 and merged it in the judgment, there was nothing left which defendant 1 could be called upon to pay under his contract of indemnity with defendant 2. It seems to me that the claim (if any) which the plaintiff had against defendant 1 and defendant 2 was an alternative claim, analogous to the sort of claim which a man may have against both principal and agent, and that the case falls within the principle of the decisions of the House of Lords in (1882) 7 A C 345 (1) and (1904) A C 11 (2). I am, therefore, of opinion that the plaintiff having elected to pursue his claims against defendant 2 to judgment has abandoned any claim he preferred against defendant 1.

In that view of the matter it is not strictly necessary to consider the first question; but as it has been argued, and

1. Scarf v. Jardine, (1882) 7 A C 345=51 L J Q B 612=30 W R 893=47 L T 258.
2. Morel Brothers & Co. Ltd. v. Westmorland (Earl of), (1904) A C 11=73 L J K B 93=89 L T 702=52 W R 353=20 T L R 38.

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as there is considerable conflict of authority on the point, I think it desirable to deal with the matter. The question really is, whether, where *A* and *B* enter into a contract under which *A* agrees to indemnify *B* against all his debts, a creditor of *B* can sue *A* on the contract. The rule of English law is clearly established that the only persons who can sue upon a contract are the parties to that contract. No doubt there are many cases in the books in which persons who are not in terms parties to a contract have been allowed to sue upon it. But those cases are based on the view that the plaintiff is claiming through a party to the contract, that he is in the position of a cestui que trust or of a principal suing through an agent, that under the old procedure he could have filed a suit in equity, even if he could not have sued at common law. Those cases are a recognized exception to the general principle that only parties to a contract can sue upon it. There seems to me to be nothing in the Contract Act which suggests that that principle does not apply in India. It is true that the definition of 'consideration' in S. 2, Contract Act, gives a wider meaning to that term than is accepted in English law, because it includes consideration moving from the promisee or any other person. But the fact that consideration may move from a third party does not involve the proposition that a third party may sue upon a contract.

The learned trial Judge based his judgment very largely on 41 Cal 137 (3). But the facts of that case were peculiar, because the plaintiff, who was not a party to the contract sued upon, had given up something, which was believed to be a charge upon property, to the defendant, who had undertaken with the other contracting party to pay the debt of that party to the plaintiff. Therefore there was communication to the plaintiff of the contract between the defendant and the other party, and the plaintiff had acted upon that contract to his detriment by handing over something to the defendant, and in those circumstances it was held that the plaintiff could maintain an action directly against the defendant on the contract to which he was not a party.

The decision seems to be in accordance with the authorities, although I am not sure that I should be prepared to go as far as the learned Chief Justice went in some of his observations. Later cases in the Calcutta High Court have applied the principle underlying that case to cases where the facts were quite different. In 22 C W N 279 (4) the principle of the case in 41 Cal 137 (3) was applied, although the contract on which the plaintiff sued had not been communicated to him, and he had not acted upon it. In the latest case in Calcutta, 61 Cal 841 (5), the Court, after reviewing all the authorities, English and Indian, came to the conclusion that under Indian law any person who took a benefit under a contract to which he was not a party could sue directly upon that contract, and that it was not necessary to invoke the doctrine of trust or agency. With all respect to the learned Judges who decided that case, I am not prepared to adopt that view. The decision seems to me to be opposed to established principle and authority, and if the rule is to be introduced into this country that any person may sue upon a contract if he takes a benefit under it, although a stranger to such contract, I think that such rule must be introduced by the legislature, and not by the Courts. From the point of view of practical convenience there seems to me to be quite as much to be said against the introduction of such a rule, as in favour of it. The reasoning in the Calcutta case is in conflict with a decision of the Full Bench of the Madras High Court in 53 Mad 270 (6), where it was held that a person not a party to a contract could not sue upon the contract except in the special cases there enunciated. I prefer the Madras decision to the reasoning in 61 Cal 841 (5).

Mr. Munshi for the plaintiff argued that under the contract between him and defendant 2 the moneys which were payable to him were not a mere debt, but were moneys held in trust for him, and if he could establish that defendant 2 had in his hands moneys or assets which

3. Debnarayan Dutt v. Chunilal Ghose, 1914 Cal 129=20 I C 630=17 C W N 1143=41 Cal 137=18 C L J 603.

4. Dwarika Nath Ash v. Priyanath Malki, 1918 Cal 941=36 I C 792=22 C W N 279=27 C L J 483.

5. Kshirodebihari Datta v. Mangobinda Panda, 1934 Cal 682=152 I C 351=61 Cal 841=38 C W N 682.

6. Subbu Chetti v. Arunachalam Chettiar, 1930 Mad 382=124 I C 55=53 Mad 270=58 M L J 20 (F B).

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belonged to the plaintiff, and transferred those moneys or assets to defendant 1 with notice of the trust, then no doubt the plaintiff could sue defendant 1 as cestui que trust suing a constructive trustee. But, in my opinion, the facts do not establish that the moneys were trust moneys. The deposit of Rs. 1,000, under the terms of the agreement, could be utilised by defendant 2, and that being so, I think that the obligation to return the deposit was a mere obligation in contract, that is to say, a mere debt; it has been held by this Court in 34 Bom L R 728 (7), that a deposit of that nature must be proved for in insolvency, and cannot be claimed as moneys subject to a trust.

The other sum claimed by the plaintiff, namely Rs. 3,649, arose in these circumstances. As I have pointed out, the plaintiff had to pay, when he ordered goods, the market value fixed by defendant 2. When the goods were subsequently sold at a greater or less price, the plaintiff was credited or debited with the balance, and this sum of Rs. 3,649 represents moneys which had been credited in that way to the plaintiff. It seems to me even more difficult to contend in the case of these moneys, than in the case of the deposit of Rs. 1,000, that they constitute anything but a mere debt. In my opinion both sums constitute a mere debt. Mr. Munshi also desired to argue that on the correspondence which took place before action between the plaintiff and defendant 1, in which defendant 1 sent the account to the plaintiff and acknowledged the amount due, there arose an implied contract on the part of defendant 1 to pay the amount. But that case has not been pleaded, and we cannot therefore go into it. Nor, as I have said, is any case of estoppel pleaded. The only case is this alleged right of the plaintiff to sue defendant 1 direct for the debt under the contract between the two defendants. In my opinion, for the reasons which I have given, that right never existed, and if it ever did exist, it was lost when the plaintiff signed judgment against defendant 2. For those reasons, I think, the appeal must be allowed with costs throughout. Charging order obtained by plaintiff vacated.

Rangnekar, J.—The suit which has given rise to this appeal was brought by the respondent (the plaintiff) against the appellants, defendant 1, and one Ishwardas Ramchand, defendant 2. The material facts were that prior to May 1934, defendant 2 was carrying on business in kerosene and petroleum in the name and style of the National Petroleum Company. On 22nd April 1933, he appointed the plaintiff as his selling agent in the territory of Cutch under an agreement, Ex. D. Under the agreement the plaintiff had deposited a sum of Rs. 1,000 with defendant 2 as security for the performance of his obligations under the agreement. As the result of dealings between them a sum of Rupees 3,649 became due to the plaintiff by defendant 2 in December 1933. In May 1934, the appellant company was formed and a certificate was issued by the Registrar of Companies on 17th July 1934 and the company then became entitled to commence business. The main object of the company was to take over the business of defendant 2 as a going concern. On 5th June 1934 an agreement was entered into between the appellants and defendant 2 by which the appellants took over the assets and liabilities of defendant 2 as from 1st April 1934. In June 1934 the plaintiff gave notice terminating the agency agreement, and in August 1934 he made a demand on defendant 1 for the payment of two sums, Rs. 3,649 in respect of the dealings between him and defendant 2, and Rs. 1,000, the amount deposited with defendant 2. Some correspondence took place, and thereafter the plaintiff drew certain bills of exchange in respect of these two sums, which were not honoured by the appellants. He then filed this suit as a summary suit. Defendant 2 applied for leave to defend the suit, which was granted on his depositing Rs. 3,500 within two weeks; but as he failed to deposit the amount, an ex parte decree for the amount claimed by the plaintiff was made against him. Defendant 1, the appellants, were given unconditional leave to defend.

The suit came on for hearing before Chitre, J. The appellants contended that there was no cause of action as against them. This contention was negatived by the learned Judge, who held that having regard to the agreement of June 1934 between the appellants and defendant 2, an obligation in the nature of a trust arose in equity, the plaintiff was a beneficiary under that trust, and was there-

7. In re Manekji Petit Manufacturing Co., 1932 Bom 311=140 I C 814=34 Bom L R 728.

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fore entitled to maintain the suit against the appellants, although he was not a party to the contract between the appellants and defendant 2. Sir Jamshed Kanga on behalf of the appellants has taken three points. The first is that under the agreement the appellants became liable to discharge the debts of defendant 2 as from 1 April 1934, and as the liability in the suit was incurred in December 1933, when the company was not in existence, the appellants were not bound to satisfy it. The next contention is that the plaintiff's remedy against the defendants was in the alternative, and he having obtained a decree against defendant 2, the suit against the appellants was barred. The last point urged by the learned counsel is that the liability, if any, of the appellants was not in trust, but in a contract as between a creditor and a debtor, and it was wrong, therefore, to hold that an obligation in the nature of a trust arose in the circumstances of this case. Before proceeding to discuss these contentions, it would be convenient to refer briefly to the two material agreements on which the respective contentions of the parties before us are founded. The first agreement, which is between the plaintiff and defendant 2, is dated 22nd April 1933. By Cl. 3 of that agreement the selling agent agreed to indent for goods required by him and to pay to defendant 2 against railway receipts or shipping documents the market value of such goods despatched by the Company.

Clause 10 provided that the selling agent should sell the goods at a price which was not to be under or above the rates fixed by defendant 2. Cl. 15 related to the deposit of Rs. 1,000. It provided that this sum was to be deposited with defendant 2 firm as security for the due performance of the terms of the agreement, and the deposit was to be returned to the selling agent on the termination of the agreement and after his liabilities had been fully satisfied. In the meanwhile if it was made in cash, it was to carry interest at 6 per cent but if in Government Securities, then the actual interest accrued thereon was to be credited to the selling agent. Then the clause provided that defendant 2 shall be entitled to utilise and use the deposit whether in cash or in Government Securities. Now although the agreement provided that the selling agent should pay to the firm the approximate market value of the goods indented by him as against the railway receipts sent to him, in practice it appears the plaintiff used to send moneys on account to the firm, sometimes much in excess of the market value of the goods actually sent to him at the time. The moneys so sent by him were credited to him in his account, and when the goods were despatched to him for sale, and sold the price realised was debited, and interest was allowed on both sides of the account, both on the value of the goods as well as on the moneys advanced by the plaintiff. The second important agreement is dated 5th June 1934, which was between defendant 2 firm and the appellants. It was in the nature of the usual preliminary contract by which a Company takes over a business as a going concern. The material provisions of that agreement are these. Cl. 1 says:

> It is hereby agreed that the vendor shall sell, assign, transfer and hand over and the Company will purchase and take over the entire concern of the National Petroleum Company together with the goodwill of the said business in continuation of the vendor's firm and in succession thereto.

By Cl. 4 it was agreed that all the book debts and other debts and outstandings due to the vendor in connection with the said business and the securities therefor should also be taken over by the Company. By Cl. 5 it was agreed that the full benefit of all contracts, agency agreements and other engagements to which the vendor was entitled should similarly be taken over. Cl. 6 related to the transfer of the cash in hand and the securities from the selling agents and cash deposits from the selling agents and all bills and notes of the vendor, to the Company. Then the consideration was set out viz. Rs. 28,43,510, which consisted partly of cash, partly of shares in the newly formed defendant 1 Company and partly as provided in the following important clause which is in these terms:

> As the residue of the consideration for the said sale the Company shall undertake to pay, satisfy and discharge and fulfil all the debts and liabilities so far as the Calcutta business is concerned from 1st March 1934, and so far as Bombay business is concerned from 1st April 1934, contracts and engagements of the vendor including costs, charges, expenses, etc., incidental and in relation to the said business and shall indemnify him against all proceedings, claims and demands in respect thereof.

It is on this clause that Sir Jamshed relies in support of his first contention.

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Now as the clauses to which I have referred stand, the contention is not without force, and if the agreement had to be construed literally then it does appear that the appellants undertook the liability to discharge the debts of the firm from 1st April 1934. But it is clear on the record that the appellants took over the whole of the liabilities from 1st April 1934, and the business then belonged to them, and all debts which would come into existence since then would be the debts of the Company. Now the clause says that the liability to discharge these debts was to be undertaken as part of the consideration for the sale of the business. To accept the learned counsel's argument would lead to this absurdity: that that liability of the Company to pay its own debts was part of the consideration for the sale by defendant 2 of his business to the Company. Clearly there can be no consideration for such an undertaking. It seems to me therefore, reading the agreement as a whole, that the parties really intended that the appellants should undertake to discharge the liabilities of the firm whenever they were incurred, but upto 1st April 1934, when they became the owners of the business, and I think the learned Judge was right in construing the agreement in that way.

Coming now to the second contention raised on behalf of the appellants, the question is what really is the nature of the liability, if any, of the appellants in the circumstances of the case? Was the claim against the defendants jointly, severally or in the alternative? The appellants say that the remedy was alternative. The respondent says that it was joint or several and that the taking of the decree against one of the co-promisors would not bar a suit against the other co-promisor. It is clear on the English authorities that if the claim was joint, then only a judgment against defendant 2 would bar the suit against the appellants. It makes no difference whether the claim was several or in the alternative [see judgment of Collins M. R. in (1903) 1 K B 64 (8).]

Section 43, Contract Act, deals with this matter. It is in these terms:

> When two or more persons make a joint promise, the promisee may in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

Then it provides for the right of contribution with which we have nothing to do in the case. Now it is well established by decisions of the Indian High Courts that the sections of the Contract Act beginning with S. 43 make all joint contracts joint and several. It is not necessary to refer to these decisions. The effect of S. 43 is that it is open to a promisee to enforce the contract either against one or some or all of the joint promisors. In this respect it is clear that the section marks a wide departure from the rules of the common law in England. According to the English law the rule is that joint contractors must be sued jointly in respect of a breach of the contract, and if only one of the joint promisors is sued, it is open to him to plead that the co-promisors should also be joined in the suit. It follows from this that in a case of a joint promise each one of the promisors is liable for the whole debt. Under this section, however, as I have pointed out, it is open to the promisee to elect to sue either the one or the other or all the joint promisors. So far, there does not seem to be any dispute at all. All the decisions that I know of have accepted this position. There is, however, considerable diversity of opinion as to whether a judgment obtained against one or some of the joint promisors is a bar to an action on the same contract against the others. The question is whether the rule in 13 M & W 494 (9) and (1879) 4 A C 504 (10), that a judgment recovered against one of two or more joint debtors is a bar to an action against the other, applies in this country. The Allahabad, Madras, and latterly, the Patna High Courts, have held that the rule does not, having regard to the underlying principle of S. 43 and S. 44, Contract Act. The Calcutta High Court says that the rule still applies in this country. As far as our High Court is concerned, it started with assuming that the rule does apply. The leading case on the subject is the case in 22 All 307 (11). In that case it was held by Strachey, C. J. that a decree ob-

8. Moral Brother & Co., Ltd. v. Westmoreland, (Earl of), (1903) 1 K B 64=73 L J K B 93 =72 L J K B 66.

9. King v. Hoare, (1844) 13 M & W 494=14 L J Ex 29=2 D & L 382=153 E R 206=8 Jur 1127.

10. Kendall v. Hamilton, (1879) 4 A C 504=48 L J C P 705=3 C P D 403.

11. Muhammad Askari v. Radhe Ram Singh (1900) 22 All 307=1900 A W N 73.

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tained against a joint promisor is not a bar to a suit against other joint promisors. It is not necessary, in view of the contentions raised before us, to refer to the decisions of the Calcutta or the Bombay High Court, which seem to take a different view. These decisions, however, it may be pointed out, are criticised by the learned authors, Pollock and Mulla, in their commentary to S. 43, Contract Act, and on this question they observe as follows (Edn. 6, p. 295):

> We think it the better opinion that the enactment should be carried out to its natural consequences, and that, notwithstanding the English authorities founded on a different substantive rule, such a judgment, remaining unsatisfied, ought not, in British India, to be held a bar to a subsequent action against the other promisor or promisors.

No doubt the point is open, and it is not necessary for me to express any definite opinion on it, but since the question has been argued, I am inclined, as at present advised, to think that the reasoning of Strachey, C. J. has considerable force in it, and the criticism of the learned commentators on the decisions taking the opposite view is justified. And I say so with all respect to the learned Judges who have taken a different view. It seems to me that the underlying principle of S. 44 also lends support to the conclusion to which the learned Chief Justice came in that case. The nature of the alternative claim is illustrated by S. 233, Contract Act, from which it appears that where the agent is personally liable, a person dealing with him may hold either him or his principal or both of them liable. The same principle applies in English law. Similarly, S. 234 is a good illustration of what an alternative remedy really means. Liability in this case is not at all joint, but is in the alternative, and if the plaintiff chooses to sue the agent who has contracted in his own name to judgment, he cannot subsequently bring an action against the principal, and as the Privy Council have pointed out in 1926 P C 136 (12), even if the judgment against the agent remains unsatisfied. The question then is, what is the nature of the liability in this case? Mr. Munshi argues that this is a case of a joint liability. It is difficult, in my opinion, to accept the contention in view of the facts of this case. The liability of defendant 2 came into existence under their agreement of 1933.

The liability, if any, of the appellants came into existence in virtue of their agreement with defendant 2 made in June 1934. It is difficult to see, therefore, how the liability of defendants 1 and 2 is a joint liability. Nor can it be a several liability for the simple reason that the contract which defendant 1 made was with defendant 2 and not with the plaintiff. Mr. Munshi, therefore, was driven to argue that this is a case of an implied promise to pay, and that implied promise to pay came into existence by reason of the conduct or representations made by the appellants when the company was formed and after it was formed. No doubt, if this case had been pleaded and established, as Sir Jamshed Kanga has conceded, the position might have been different. The plaint, however, clearly shows that the claim is not founded upon an implied promise to pay given by the appellants, but the claim is founded upon an equity arising under the appellants' contract with defendant 2 and in virtue of the fact that the appellants had taken over the liability to discharge the obligations of defendant 2. There is nothing in the whole of the claim to suggest that any representations were made by defendant 1 whereby they led the plaintiff to adopt a particular course of conduct to his prejudice. There is no case of estoppel, there is no case of an implied promise to pay. It seems to me the claim really was in the alternative. The plaintiff's case is that by virtue of the contract of 1933 defendant 2 are liable to pay the amounts to him, and by virtue of the agreement between defendant 2 and defendant 1 made in 1934 defendant 1 are liable, as they on behalf of defendant 2 agreed to pay the debt which was due by the latter. That is the very highest at which the case can be put, if it rested on contract.

That clearly is a case which comes very near to the case referred to in S. 233, Contract Act, and if so, the case is clearly one of election and if the promisee chooses to proceed against one of the copromisors and obtains a judgment, then it is clear that he has no right to proceed against the other co-contractors or copromisors, and the case, in my opinion,

12. Somasundaram v. Subramanian, 1926 P C 136=99 I C 742.

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falls within the principle of the decision in (1882) 7 A C 345 (1) and (1904) A C 11 (2). In that view, I think the plaintiff's suit as against the appellants must fail. I may mention here that it is clear from the facts, and it was also conceded, that there is no case of novatio in this case.

This brings me now to the third contention raised by Sir Jamshed Kanga. It resolves itself into this, that the plaintiff who is a stranger to the contract, cannot enforce the contract even though it may have been made for his benefit. The answer made by the respondent is that having regard to the agreement of 1934 between the appellants and defendant 2, a trust arises, and that being so, he, as beneficiary, is entitled to enforce the contract even though he was not a party to it. Mr. Munshi puts his case in this way. He says that the sum of Rs. 1,000 clearly was earmarked and was a deposit, and therefore held by defendant 2 in trust for the plaintiff, and the appellants having taken over that sum with notice of the trust, he is entitled to follow that sum in their hands, and therefore to maintain this suit as against them for the recovery of that sum. As regards the other sum of Rs. 3,649, his argument is that that also was in the nature of a deposit, having regard to the course of dealings between the parties and a similar obligation in equity would arise against the appellants as in the case of the deposit of Rs. 1,000. In English law consideration has to move from the promisee, and it is well established there that a stranger to the consideration cannot sue on the contract, unless it is made on his behalf by an agent or a trustee. In (1880) 16 Ch D 125 (13), Jessel M. R. observed as follows (p. 129):

> Supposing, however, that there was, it is then contended that a mere contract between two parties that one of them shall pay a certain sum to a third person not a party to the contract, will make that third person a cestui que trust. As a general rule that will not be so. A mere agreement between *A* and *B* that *B* shall pay *C* (an agreement to which *C* is not a party either directly or indirectly) will not prevent *A* and *B* from coming to a new agreement the next day releasing the old one. If *C* were a cestui que trust it would have that effect. I am far from saying that there may not be agreements which may make *C* a cestui que trust.

(1915) A C 847 (14) is also an authority for both these propositions. In that case Viscount Haldane L.C. observes as follows (p. 853):

> My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request.

Another equally well-established principle is that there must be privity of contract for a right of action. The Indian law, however, differs from this rule of the English law as to the necessity of consideration moving from the promisee. The definition of consideration in S. 2, Contract Act is much wider, according to which consideration may move from a third party. But, in my opinion, in spite of the decisions to the contrary, to some of which we have been referred, the other proposition still remains good in Indian law, and a person not a party to the contract is not entitled to maintain an action for breach of that contract, and that seems to me to be clear from S. 2, Contract Act itself read as a whole and in particular the sub-cls. (a), (b) and (c). The whole scheme of the section is that a promise comes into existence when one person signifies to another his willingness to do or abstain from doing anything and the other person signifies his assent thereto, the person making the proposal is the promisor. The person accepting the proposal is the promisee, and every promise and every set of promises, forming the consideration for each other, is an agreement between those two persons. In my opinion it is wrong to say that there is no provision in Indian law in support of this principle, which has been well established in England from very old times. Now in England, since the decision in (1861) 1 B & S 393 (15), the doctrine of constructive consideration enunciated by cases like (1661) 2 Lev

13. *In re* Empress Engineering Co., (1880) 16 Ch D 125=43 L T 742=29 W R 342.

14. Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd, (1915) A C 847=84 L J K B 1680 =113 L T 386=31 T L R 399=59 S J 439.

15. Tweddle v. Atkinson, (1861) 1 B & S 393=30 L J Q B 265=8 Jur N S 332=4 L T 468= 9 W R 781.

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210 (16), has gone by the board, and it is settled law that a stranger to a contract cannot sue.

But, as I have just pointed out, there are two exceptions made to this general rule. The first exception is where the contract is made by a trustee for the benefit of a beneficiary, in other words, where there is a case of trust, and the other exception is where by acknowledgment or part payment or by estoppel privity may be established as a ground of agency. These two exceptions are also recognized by the decisions in this country. The Privy Council decision in 32 All 410 (17) is relied upon as making a third exception. I do not think so. The underlying principle of that decision is that where a contract between *A* and *B* is intended to secure a benefit to *C* as a cestui que trust, *C* may sue in his own right to enforce the trust. This case was followed by the Calcutta High Court in 41 Cal 137 (3), on which Mr. Munshi relies and on which the learned Judge also relied in support of the conclusion to which he came. In that case *A* advanced Rs. 300 to *B* on the security of a pattah relating to immoveable property and deposited by him with *A*. *B* executed a registered instrument of transfer of all his property to *C* for a sum of Rs 2,000. This sum of Rs. 2,000 was not all paid in cash, but there was a provision and declaration in the kabala that out of this consideration money of Rs. 2,000, a sum of Rs. 300 due to *A* should be paid by *C*. *A* sued *C* for Rs. 300, basing his claim on the kabala. It was found that there was no agreement between *A* and *C*, nor was there a novatio, but on that very day on which the kabala was executed *C* acknowledged the obligation to pay Rs. 300 to *A*, that the acknowledgment was communicated to and accepted by *A*, and that as a result of this the pattah, which was believed by the parties as constituting a charge, was handed over by *A* to *C*. Upon these facts it was quite clear that the decision to which the learned Chief Justice came was perfectly correct, and well within the principles to which I have referred. There are, however, certain observations in the decision of the eminent Chief Justice, which, with all sincere respect to him, seem to me to go much beyond the facts of the case, and with which, in my humble opinion, it is difficult to agree.

This decision, in my opinion, has gone the farthest limit as regards the right of suit in contract. Another exception to this well established rule which the Courts have accepted is the case of a family settlement, where there is a provision for payment of maintenance or marriage expenses for the benefit of the female or minor members of the family. This, however clearly falls within the limits of the rule in 32 All 410 (17). The learned counsel for the respondent also relies on 61 Cal 841 (5). In that case it was held that there was nothing in the Indian Contract Act which prevented a stranger to a contract from suing on it if it was for his benefit, even though the circumstances did not bring into existence an obligation in the nature of a trust in his favour. It was said in that case that the definition of 'consideration' in the Indian Contract Act is much wider than the definition in England, and that in British India, the aim should be to do complete justice in one suit, and therefore, the rights of the parties should be determined according to general principles of "justice, equity and good conscience."

This decision in my opinion has gone even beyond 41 Cal 137 (3), and it broadly lays down that on general principles of justice, equity and good conscience a contract between *A* and *B* may be enforced by *C* if there is a provision in the contract for the benefit of *C* whether, there is a trust or not. It was pointed out by their Lordships of the Privy Council in the well known case in 14 I A 89 (18) that the words "justice, equity and good conscience" mean nothing more than the rules of English law so far as they are applicable to Indian society and circumstances in this country. Since then the Courts in this country have invoked the aid of these words in cases where there is no specific provision of the law in this country applicable to the facts of a case. I have said above that there are ample indications in S. 2, Contract Act, to take the view that the legislature in this country also has accepted the well established principle that

16. Dutton v. Poole, (1661) 2 Lev 210.
17. Khwaja Muhammad Khan v. Husaini Begam, (1910) 32 All 410=37 I A 152=7 I C 237 (P C).
18. Waghela Rajsanji v. Shekh Masludin, (1887) 11 Bom 551=14 I A 89 (P C).

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a stranger to the contract has no right of action to enforce it. With the utmost respect to the learned Judges, therefore, I have no hesitation in dissenting from that judgment. It seems to me to be contrary to all recognised decisions in English law as well as to all modern decisions in Madras and other High Courts, and also to the decision of their Lordships of the Privy Council in 34 All 63 (19). See 53 Mad 270 (6)

These then being the principles, the question is whether an obligation in the nature of a trust arises in this case, as the learned trial Judge has held, and whether the plaintiff is a cestui que trust. As regards the first sum, undoubtedly the clause in the agreement between the parties shows that it was a deposit, but it also shows that it was deposited as a security for the performance of the services which the plaintiff had to render under the agreement. It further shows that the moneys were not earmarked, and that it was open to defendant 2 to mix them up with their own moneys and use them, and if they used them, they were liable to pay interest as in the ordinary case of a deposit in a bank. It was held in 16 Bom L R 733 (20) by Scott, C. J. that in such a case where a deposit is made by an employee as a guarantee for the faithful services under his agreement of employment, it constituted a mere debt from the employer to the employee which had to be repaid on the termination of the service and in accordance with the contract. This case was followed by B. J. Wadia, J. in 34 Bom L R 728 (7). As regards the other sum of Rs. 3,649, there is no clause in the agreement which shows that the moneys paid in by the plaintiff in respect of the goods supplied or to be supplied to him where to be held as deposit by defendant 2. But Mr. Munshi relies upon the course of dealings, which, in my opinion, does not establish that these moneys were a deposit. It seems to me that these moneys were paid on account of the value of the goods which defendant 2 were to entrust to the plaintiff for sale in Cutch, which was a foreign territory, and an account in respect of that was to be made up on the realisation of the sale proceeds of the goods so entrusted and the balance due to or from either party was brought into account from time to time. In my opinion therefore that sum also was a debt on the termination of the ageney due by defendant 2 to the plaintiff. Having regard to the clauses of the agreement of 1934, to which I have referred, which is no more than an agreement to take over a going concern, the effect of the agreement is not to make all selling agents beneficiaries or to create a trust in their favour, or to make all the creditors of defendant 2 beneficiaries. The clause in the agreement on which Mr. Munshi relies is the usual clause one finds in preliminary agreements whereby a company which is about to be incorporated undertakes to pay the debts of the vendor and to indemnify the vendor against the same. I think, therefore, the circumstances do not establish a case of trust, or even of fiduciary relationship between the parties.

Mr. Munshi has relied upon S. 94, Trusts Act. The obvious answer to the point is that in the case provided for by that section, the person who comes into possession of the property gives no consideration for it, and he certainly holds it in a fiduciary capacity. In this case the company gave consideration for taking over the assets as well as the liabilities. That being so the case does not come within S. 94, Trusts Act. I agree, therefore, that the appeal must be allowed with costs throughout.

R.M./R.K. *Appeal allowed.*

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BROOMFIELD AND TYABJI, JJ.

Maganlal Chunilal Choksi—Appellant.

v.

Kanchanlal Manchharam and *others*—Respondents.

First Appeal No. 253 of 1934, Decided on 16th March 1936, from decision of First Class Sub-Judge, Surat, in R. C. S. No. 581 of 1930.

Court-fees Act (1870), Ss. 17 and 7 (4) (f)—Administrative suit—Claim valued at Rs. 200 for purposes of court-fee and at same figure for purposes of jurisdiction—Plaint containing prayer for declaration that certain will was void and for order that property to be finally handed over to executors after it was ascertained—Suit held was one for accounts coming under S. 7 (4) (f), Court-fees Act, and valuation of subject matter being for less than Rs. 5000, appeal lay to District Judge.

19. Jamna Das v. Ram Autar Pande, (1912) 34 All 63=39 I A 7=13 I C 304 (P C).
20. G. K. Malvankar v. Credit Bank, India Ltd, 1914 Bom 118=27 I C 343=16 Bom L R 733.

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In an administration suit the reliefs prayed for were that certain will of the deceased alleged to be fabricated should be declared null and void, that the immoveable and moveable property, claims, debts and legacies of the deceased should be ascertained, and the property might be determined and administered and that the same should be finally ordered to be made over to the executors of the will. The plaintiffs valued their claim at Rs. 200 for the purposes of court-fee and valued the claim at the same figure for the purposes of jurisdiction:

Held : that the suit was one for administration in spite of the fact that the final decree to be passed might award possession of immoveable properties. Further S. 17, Court-fees Act, did not apply because the suit did not embrace two or more distinct subjects as the other reliefs claimed by the plaintiffs were all incidental to the chief item of relief which was the administration of the estate. [P 356 C 1,2]

For these reasons the suit was one for accounts coming under S. 7 (4) (f), Court-fees Act, and in view of the valuation placed by the plaintiffs on the relief claimed by them and the provisions of S. 8, Suits Valuation Act, the subject matter of the suit was less than Rs. 5,000 in value and the appeal lay to the District Judge: 1915 *Bom* 59; 19 *Bom* 198 and 1918 *Cal* 883, *Rel. on*; 1918 *P C* 188, *Expl. and Disting.* [P 356 C 2]

G. N. Thakor and *B. G. Thakor*—for Appellant.

H. C. Coyajee and *N. N. Majumdar*—for Respondents Nos. 1 to 11.

Broomfield, J.—This is an appeal in a suit filed by the respondents which was described as an administration suit and has been held to be such by the trial Court, the First Class Subordinate Judge of Surat. A preliminary decree has been passed, presumably under O. 20, R. 13, directing inquiries to be made and accounts taken. An objection has been taken by the respondents that the appeal lies to the District Court, Surat, and not to the High Court. We are of opinion that this objection must be sustained. The allegations in the plaint are as follows: One Pranjivandas Bijvallabhdas died at Surat, on 4th February 1930; plaintiffs 1 and 2 and the defendants are the executors of a will made by him on 10th August 1927; and plaintiffs 3 to 6, 8 and 9 are the daughters of the deceased and plaintiff 7 is the son of plaintiff 6. The deceased left immoveable and moveable property of considerable value which is described and valued so far as the information of the plaintiffs goes, but they say that they are not at present in a position to state the same definitely. Defendant 1 is a distant relative of the deceased, viz., the son of his maternal uncle's daughter's son, but he was brought up and maintained by him. In the will of 10th August 1927 which was propounded by the plaintiffs as the last will and testament of Pranjivandas, various legacies have been given to plaintiffs 4 to 9, and certain property has been given to them and other property has been given to the defendant and his wife subject to certain restrictions.

It is alleged by the plaintiffs that defendant 1 procured and fabricated another will which he put forward as having been executed by Pranjivandas in February 1930, shortly before his death. The plaint alleges that this will is null and void and cannot be given effect to. In para. 7 of the plaint it is stated that in the event of the Court finding neither of the wills valid, then plaintiffs 4 to 7 and 9 are legally entitled as heirs to the entire property of the deceased. In para. 8, there is a description of the properties "so far as the plaintiffs know at present." There is a house valued at Rs. 7,000; another building valued at Rs. 2,500; another house valued at Rs. 20,000; ornaments, jewellery, furniture, etc., valued at Rs. 7,000; and outstandings and other moveables valued at about Rs. 45,000. The plaint recites that the immoveable properties of the deceased are as described above. But that as regards his moveable property consisting of ornaments, outstandings, etc., the value cannot be definitely stated without seeing the account books and making accounts, and the values thereof which have been stated above are stated approximately. Then in para. 10 it is stated that as the suit is for administration, the claim is valued at Rs. 200 for the purposes of court-fee and for that purpose court-fee stamp of Rs. 15 is used and the claim is valued at the same figure for the purposes of jurisdiction and pleader's fees and for the purpose of the process fee. Then in para. 11 the reliefs prayed for are set out; that it may be declared that the will of the deceased Pranjivandas Bijvallabhdas, dated 2nd February 1930, is null and void and the will dated 10th August 1927, stands good and the immoveable and moveable property, claims, debts, legacies etc., of the deceased may be ascertained, and the property may be determined and administered and the same may be finally ordered to be made over to the executors of the will dated 10th August 1927, for things being

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carried out according to the said will. Or if both the wills are held to be invalid, then the property of the deceased may be administered as if the deceased had died intestate, and may be ordered to be delivered into the charge of the above mentioned legal heirs of the deceased.

In the written statement it is objected that the suit is not properly speaking one for administration, but is in part at any rate a suit for obtaining possession of property, the value of which is ascertainable, and on that view the proper court-fee has not been paid. The trial Court framed a preliminary issue as to whether the proper court-fee had been paid, and decided in the affirmative. The learned Judge dealt with the point very briefly, merely stating that the present suit is for administration and that it should be treated as a suit for account, the plaintiffs being at liberty to put their own valuation under S. 7, Cl. (4) (f), Court-fees Act, 1870. He refers to 39 Bom 545 (1). Mr. Coyajee, who appears for the respondents, contends that as this is held to be an administration suit coming under S. 7, Cl. (4) (f), Court-fees Act, an appeal must lie to the District Court and not to this Court, because under S. 8, Suits Valuation Act, 7 of 1887, in such cases the value as determinable for the computation of court-fees and the value for purposes of jurisdiction are the same. The question whether the appeal lies to the District Court or to this Court depends upon the amount or value of the subject-matter of the suit. In S. 26, Bombay Civil Courts Act, 14 of 1869, it is provided that in all suits decided by a Subordinate Judge of the First Class in the exercise of his ordinary and special jurisdiction of which the amount or value of the subject matter exceeds Rs. 5,000, the appeal from his decision shall be direct to the High Court. S. 8 of the same Act provides that except as otherwise provided, the District Court shall be the Court of appeal from all decrees and orders passed by the subordinate Courts from which an appeal lies. The question is therefore whether the value of the subject matter of the suit does or does not exceed Rs. 5,000. That question again has to be determined according to the provisions of S. 8, Suits Valuation Act which is as follows:

1. Khatija v. Sheikh Adam Huseinally, 1915 Bom 59=29 I C 949=39 Bom 545=17 Bom L R 574.

Where in suits other than those referred to in the Court-fees Act, 1870, S. 7, paras. 5, 6 and 9, and para. 10, Cl. (d), Court-fees are payable ad valorem under the Court-fees Act, 1870, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same.

As I have already stated, the lower Court has treated this as a suit coming under Cl. (4) (f) of S. 7, Court-fees Act, that is to say, it has been treated as a suit for accounts. In such suits the court-fee payable is computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. The plaintiffs have valued the reliefs sought by them at Rs. 200 and an ad valorem fee of Rs. 15 has been paid thereon. It is common ground that if this suit is properly to be treated as one coming under S. 7, Cl. (4) (f), Court-fees Act, then the court-fees have been correctly computed, and by reason of S. 8, Suits Valuation Act the subject matter of the suit must be taken to be less than Rs. 5,000, and the appeal lies to the District Court and not here.

Mr. Thakor who appears for the appellant has contended that this is not to be regarded as a suit for accounts or not one coming entirely within the scope of S. 7, Cl. (4) (f), Court-fees Act. His argument is two-fold. He contends in the first place that the effect of the declarations asked for would be that the plaintiffs would get possession of immoveable properties admittedly exceeding Rs. 5,000 in value; also in the case of the prayer for alternative relief if the Court were to hold that the estate is to be administered as on intestacy, immoveable properties of a value exceeding Rs. 5,000 are claimed by the plaintiffs and the final decree of the Court would deliver possession to them. Accordingly, the learned counsel contends that this suit should properly be regarded as a suit coming under Cl. (5) of S. 7, Court-fees Act and not under Cl. (4) (f) of the section. The other part of his argument is that the first declaration prayed for, namely the declaration that the will dated 2nd February 1930, is null and void, is a declaration without consequential relief, that in that respect the suit is for a declaration pure and simple, and that under Sch. 2, Court-fees Act a fixed court-fee is payable thereon. On this ground also he seeks to take the case out of the operation of S. 7, Cl. (4) (f), the fee payable not being an ad valorem fee. He

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also relies in this connection on S. 17 of the same Act which provides that where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable, and on the decision of the Privy Council in 46 I A 24 (2). In that case it was held by their Lordships that if any part of the court-fee payable and paid was a fixed fee under Sch. 2 of the Act, the notional value of the property or any part of it could not displace its real value for the purposes of jurisdiction.

The question is by no means free from difficulty, and it is impossible to reconcile all the decisions of the various High Courts on this and analogous points. But on the whole we are satisfied that neither of Mr. Thakor's arguments should be accepted. This cannot be regarded as a suit for possession of property, the value of which can at the present time be ascertained. As Mr. Coyajee says, the debts that have to be paid, the claims that have to be met and the legacies may be considerable and it is impossible for the plaintiffs to say that they will be entitled to any specific properties or even that they will be entitled to any properties exceeding in value Rs. 5,000. We are not prepared to say that this case can really be distinguished from such cases as 39 Bom 545 (1) and 19 Bom 198 (3) where suits claiming reliefs similar to the reliefs claimed here were held to be administration suits coming under S. 7, Cl. (4) (f), Court-fees Act, in spite of the fact that the final decree to be passed might award possession of immoveable properties: 39 Bom 545 (1) has been followed by other High Courts, e. g., by the Calcutta High Court in 44 Cal 890 (4).

The reply to the other part of Mr. Thakor's argument seems to us to be that S. 17, Court-fees Act does not apply, because this suit does not embrace two or more distinct subjects. As in 19 Bom 198 (3) the other reliefs claimed by the plaintiffs are all incidental to the chief item of relief which is the administration of the estate. Moreover it cannot be said, in our opinion, that the plaintiffs are asking for a bare declaration without consequential relief. The two declarations sought are intimately connected and the reliefs consequential thereon are that accounts should be taken, that inquiries should be made and that the estate should be administered and finally the residue of the estate should be handed over. That being so, the Privy Council case in 46 I A 24 (2) has no application, because, as explained in 33 Bom L R 1437 (5) that was in effect a suit for a bare declaration without consequential relief. It is only in suits of that nature that the dictum of their Lordships applies, that it is the real value of the property and not the notional value that determines the valuation for jurisdiction. I may note also that it is clear from their Lordships' judgment that the suit before them was one embracing two or more distinct subjects so that it was capable of being brought under S. 17, Court-fees Act. We hold that this must be regarded as a suit for accounts coming under S. 7 (4) (f), Court-fees Act, and that in view of the valuation placed by the plaintiffs on the relief claimed by them and the provisions of S. 8, Suits Valuation Act, the subject matter of the suit is less than Rs. 5,000 in value and the appeal lies to the District Judge. The memorandum of appeal, therefore, must be returned for presentation to the District Court. Cross-objections also to be returned. In view of the difficulty of the questions involved, and the fact that the appellant was genuinely in doubt as to the proper forum of appeal, we make no order as to costs.

D.S./R.K. *Order accordingly.*

2. Rachappa Subrao Jadhav v. Shidappa Venkatrao Jadhav, 1918 P C 188=50 I C 280=46 I A 24=43 Bom 507 (P C).

3. Bai Amba v. Pranjivandas Dullabhram, (1895) 19 Bom 198.

4. Shashi Bhushan Bose v. Manindra Chandra Nandy, 1918 Cal 883=38 I C 835=44 Cal 890.

5. Shivsangappa v. Muchkhandeppa, 1932 Bom 160=135 I C 467=33 Bom L R 1437=56 Bom 8.

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BEAUMONT, C. J. AND BLACKWELL, J.

Ford Motor Co. of India, Ltd.—Appellants.

v.

Secy. of State—Respondent.

O. C. J. Appeal No. 25 of 1935, Decided on 4th October 1935.

(a) Sea Customs Act (7 of 1878), S. 30 (a) —"Time and place of importation"—Expression must be construed reasonably and with reference to particular facts of any given case.

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The word "time" in "at the time and place of importation" does not refer to the precise moment of time at which goods are imported, that is unloaded from the ship. There must be a reasonable time in which the sale can take place. Similarly the phrase 'place of importation' cannot mean the exact spot of land on which goods are landed, whether on the wharf or on the shore. It must cover a wider area than that, and mean the place whether Bombay, Madras, Karachi or elsewhere as the case may be at which the goods are imported. The words must be given reasonable construction and the phrase 'time and place of importation' must be considered in relation to the particular facts of any given case: 1932 *P C* 168, *Disting.* [P 358 C 1]

(b) Sea Customs Act (7 of 1878), S. 30 (a) —"Less trade discount"—Meaning.

The words 'less trade discount' mean "less trade discount if any". [P 359 C 1]

(c) Sea Customs Act (7 of 1878), S. 30—Import of cars—Price list—Dealers notified to take delivery at price in price list on payment of price in cash—Price paid by dealer before delivery within two or three days of landing — Price paid was wholesale cash price — Price not affected by overhead charges.

A, importers into India of Ford cars, acquired them from the manufacturing company in Canada, by ordering them from the manufacturing company in such numbers as they required and were charged free on board Canadian port. The manufacturers paid the freight and insurance in the first instance but debited those charges against the importers and the importers *A* arranged for sale of cars in India through various agents. The practice was that various distributing agents in India informed the importers what their requirements would be for the purchase of cars at certain intervals. Importers sent an order for such cars. The price which the distributors were to pay was not fixed or discussed at the time when the order for car was given but when the car arrived in Bombay, the importers fixed the retail price at which the different models were to be sold in India. That price was published in a list which was available to all dealers and the price which the importers *A* charged the dealers was that retail price less twenty per cent. As soon as the cars arrived in Bombay the dealers were notified and they then had to come, pay the price in cash and then take delivery of goods. If the dealer was in Bombay the delivery was made at his place of business. If the dealer was at some other place delivery was made at the appropriate railway station in Bombay and the price lists showed that the prices were F.O.R. main ports of entry. The goods were usually delivered within two or three days of landing. The cars when imported were not in running order and the importers therefore allowed a fixed sum per car to the dealer to cover the costs of assembling the car and also paid cartage for delivery of cars. The importers further incurred overhead expenses in the shape of office expenses, advertisement charges and their own profits:

Held: (1) that the only contract of sale which took place was the contract which was completed when the dealers were notified of the arrival of their goods and the price to be paid, and when in pursuance of that notification they paid the price and the goods were delivered. [P 358 C 2; P 359 C 1]

(2) that the transaction amounted to a sale which took place at Bombay, the place of importation and at the time of importation that is to say within a reasonable time, one or two days after the actual landing of goods. [P 359 C 1]

(3) that the price was a wholesale cash price for the goods as there was a plain distinction between the retail price fixed for the dealers and that price less twenty per cent which the dealer had to pay, the latter price being the wholesale price. [P 359 C 1]

(4) that the case fell within the exact words of S. 30 (a) and did not fall under sub-s. (b). [P 359 C 1]

(5) that in determining the wholesale cash price it was not legitimate to dissect the actual price paid, deduct from it such portions as may be ascertained to represent something other than the price of the goods e. g. the cost of service and then say that the residue left was the wholesale cash price of goods. [P 359 C 2]

C. K. Daphtary and *M. A. Somjee*—for Appellants.

Jamshed Kanga and *G. C. O'Gorman*—for Respondent.

Beaumont, C. J.—This is an appeal from a decision of Tyabji, J., and it raises a question as to the basis upon which the plaintiffs, Ford Motor Company of India, Limited, ought to be charged under the Sea Customs Act, 1878. S. 29 of that Act provides that:

> On the importation into, or exportation from, any customs-port of any goods, whether liable to duty or not, the owner of such goods shall, in his bill of entry or shipping bill, as the case may be, state the real value, quantity and description of such goods to the best of his knowledge and belief, ...

Then S. 30 deals with the manner in which the real value has to be ascertained and is in the following terms:

> For the purposes of this Act the real value shall be deemed to be—(a) the wholesale cash price, less trade discount, for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of importation or exportation, as the case may be, without any abatement or deduction whatever, except (in the case of goods imported) of the amount of the duties payable on the importation thereof: or (b) where such price is not ascertainable the costs at which the costs of the like kind and quality could be delivered at such place, without any abatement or deduction except as aforesaid.

It is rather curious that both sub-sections refer to price or cost of goods of the like kind and quality, and do not refer to the actual goods, the subject of the transaction in question; but it is conceded that where there is a sale falling within the terms of sub-s. (a) of specific goods, the price of those goods is the real value, and it is not necessary to consider the price of other goods of the like kind and

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quality. Perhaps a literal reading of the section can be complied with by saying that specific goods must be of the like kind and quality to themselves. It is clear also that sub-s. (b) only applies where you cannot ascertain the wholesale cash price referred to in sub-s. (a).

The section was recently construed and discussed by the Privy Council in 59 I A 258 (1). The actual decision in that case was only that where you have a sale by the importer in bulk of goods to the actual user, the price charged is not a wholesale price, because there is no retail price in such a case, there being only a dealing direct between the importer and the consumer without the intervention of a dealer. So that the actual decision does not affect this case, in which there is no question of there being a wholesale price. But certain dicta of their Lordships are relied upon as to the meaning of sub-s. (a), particularly the view expressed that the price must be free from any loading or any post-importation charges incurred in relation to the goods, and that the price is to be a price for goods as they are both at the time and place of importation. Their Lordships do not define what is meant by "time and place of importation"; and I think we must give a reasonable construction to the words. Plainly, time cannot refer to the precise moment of time at which goods are imported, that is unloaded from the ship. There must be a reasonable time in which a sale can take place.

I think also that "place of importation" cannot mean the exact spot of land on which goods are landed, whether on the wharf or on the shore. It must cover a wider area than that; and I should say that, generally speaking, "place of importation" means the place, whether Bombay, Madras, Karachi, or elsewhere as the case may be, at which the goods are imported. No doubt the phrase "time and place of importation" must be considered in relation to the particular facts of any given case. I agree with Mr. Coltman's argument that in dealing with commodities, the market price of which may vary from day to day, one would have to take the price ruling on the day of importation in considering the price at which goods of a like kind and quality were capable of being sold. Now the facts of the present case, so far as relevant, are these. The plaintiffs are importers into India of Ford motor cars. They acquire them from the manufacturing company in Canada. It is not, I think, necessary to discuss in any detail the terms of their dealings with the manufacturing company. They order from the manufacturing company such number of cars as they require, and the appellants are charged free on board the Canadian port. The manufacturers pay the freight and insurance in the first instance, but debit those charges against the appellants. The important matter to consider is what the dealings are between the plaintiffs and their customers in India. The evidence is that the plaintiffs are mere importers. They arrange for the sale of the cars in India through various agents. They have one principal agent in Bombay city, namely the Ford Automobiles (India) Ltd., and they have other distributing agents in other parts of India. What happens in practice is this.

The various distributing agents in India inform the plaintiffs what their requirements will be for the purchase of cars, and at intervals, say once or twice a month, the plaintiffs send to Canada an order for such number of cars as their distributing agents have intimated that they are ready to take. The price which the distributors pay is not fixed, or indeed discussed, at the time when the order for a car is given; but when the car arrives in Bombay the plaintiffs fix the retail price at which the different models are to be sold in India. That price is published in a list which is available to all the dealers, and the price which the plaintiffs charge to the dealers is that retail price less 20 per cent. The evidence as to all these matters is that of Mr. Corey. He has produced unfortunately very few documents, but it is common ground that his evidence is entirely reliable. As soon as the cars arrive in Bombay, the dealers are notified, and they then have to come and pay the price which, as I said, they ascertain from the price lists supplied to them. They have to pay that price in cash, and then they take delivery of the goods. If the dealer is in Bombay, delivery is made at his place of business. If the dealer is at some other place, then delivery is made at the appropriate railway station in Bombay, and the price lists show that the prices are F. O. R.

1. Vacuum Oil Co. v. Secretary of State, 1932 P C 168=137 I C 535=59 I A 258=56 Bom 313 (P C).

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main ports of entry. The evidence of Mr. Corey is quite clear that the plaintiffs never deliver the cars until they get payment, and that the goods are usually delivered within two or three days of landing.

It seems to me that the sale, therefore, is at the time and place of importation. Mr. Coltman argued that the sale was not at the time of importation, because the real sale took place at the time when the dealer gave his order which resulted in the goods being ordered by the plaintiffs from Canada. But apart from the fact that Mr. Corey admitted that there was no concluded agreement at that date, it seems to me quite impossible in law to suggest that there was an actual contract of sale at that date. The goods were not ascertained, and probably not even manufactured, and there is no evidence that the price was agreed to, or that any method of ascertaining the price was agreed to. In my opinion, the only contract of sale which took place—and it is only a contract for sale which is relevant for the present purpose—was the contract which was completed when the dealers were notified of the arrival of their goods and the price to be paid, and when in pursuance of that notification they paid the price and the goods were delivered. It seems to me that that transaction amounts to a sale which took place at Bombay, the place of importation, and at the time of importation, that is to say, within a reasonable time, one or two days after the actual landing of the goods. The only other question to be determined in order to bring the case under sub-s. (a) is whether the price was a wholesale cash price for the goods. It is obvious, I think, that it was a wholesale price, because there is a plain distinction here between the retail price fixed for the dealers, and that price less 20 per cent which the dealers have to pay, the latter price being the wholesale price.

There is no question of any trade discount in this case, because it was a net price, and I think the words in the section "less trade discount" mean "less trade discount, if any." It is also quite plain that the price was a cash price, and that is not disputed. So that taking the words of the section as they stand, it seems to me that this case plainly falls within the exact words of sub-s. (a), provided that the price was the price of the goods. Mr. Coltman argues that the sale does not fall within the words of the sub-section as construed by the Privy Council in the case to which I have referred, because the price includes certain post-importation charges, and is not therefore, the price only of the goods. The learned Judge in the Court below agreed with that view and held that there are two items of post-importation charges, for which some deduction must be made from the sale price in order to ascertain the wholesale cash price. To that part of the decision there are cross-objections, and I think those cross-objections must prevail. In my view, the Court has to find a sale of the goods at a wholesale cash price, and it is not legitimate to dissect the actual price paid, deduct from it such portions as may be ascertained to represent something other than the price of the goods, e. g., the cost of service, and then say that the residue left is the wholesale cash price of the goods. *Non constat* that the actual goods or other goods of a like kind and quality could be sold at all apart from the services.

The two items to which the learned Judge refers are a charge for assembling the cars and cartage charges. As to the first, the evidence of Mr. Corey is not very clear, but on the whole I think that it comes to this: that the plaintiff-company had to deliver the cars in running order, that they were not in a position in 1929, when the transaction in suit took place, to assemble the cars themselves, and therefore they used to make a fixed allowance to the dealer of Rs. 13-8-0 per car to cover the cost of assembling the car. There is no dispute that that deduction was properly made from the wholesale cash price, and it seems to me that that does not affect the question as to there being a wholesale cash price. What it really comes to is that the wholesale cash price for a car in running order is reduced by a small sum by an arrangement between the two parties, because the car delivered is not in the condition specified. That does not prevent the sale being a sale of the car at a wholesale cash price. It is merely an agreed deduction made from the price on account of the goods not being in accordance with the contract requirements.

With regard to cartage charges, the position is this. The plaintiffs have to deliver the car, as I have said, either at

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the place of business of the dealer, if he carries on business in Bombay, or at the appropriate railway station if the dealer carries on business upcountry. There is no express provision as to the inclusion in the price of cartage charges. Exactly the same price is charged to everybody, whether the place of business of the dealer is near the port, or at the other end of Bombay. What it really comes to is that the contract is for the sale of a car deliverable at a particular place in Bombay, and it seems to me that cost of getting the car to that place in Bombay is a part of the purchase price of the car. We must, in my opinion, take a business view of the transaction and determine whether the sale price is in a business sense the price of the goods or includes a charge for services rendered which prevents the price being fairly considered to be the price of the goods. Mr. Coltman did not confine his argument to post-importation charges, though he laid more emphasis on them having regard to the views expressed by the Privy Council, but in opening the case he complained that the price charged by the plaintiffs covered the overhead charges of the plaintiffs, e. g., office expenses and advertisement charges, as well as the plaintiffs' profit, and he said, with a certain amount of force, that it was rather hard to be taxed on those charges. The answer to that is that we have to construe the Act. Every normal sale between merchants must show a profit to the vendor and, therefore, cover his overhead charges, but these are really pre-importation charges. The fact that the price also includes some slight post-importation service, such as free delivery within the place of importation, cannot in my opinion operate to prevent the sale price being held to be for the price of the goods. In my opinion, the facts proved in this case show that there was a sale exactly conforming to all the requirements of sub-s. (a) of S. 30, and that being so, we are bound to hold that the assessment of the plaintiffs under that sub-section is correct, and their suit for a declaration that the basis is incorrect and *for* the refund of moneys paid by them on that basis fails. The order of the lower Court will be varied by merely dismissing the plaintiffs' suit with costs. Apart from that the appeal fails and must be dismissed with costs. Cross-objections allowed with costs.

Blackwell, J.—I am of the same opinion. In 59 I A 258 (1) their Lordships of the Privy Council observed that a wholesale cash price may be found in the actual sales of the goods by the persons themselves who are sought to be charged, if there are no other goods of a like kind and quality. Mr. Coltman has conceded that if the goods which are the subject matter of this appeal were in fact sold at a wholesale price, less trade discount, that sale may itself establish that goods of a like kind and quality are capable of being sold at a wholesale cash price, less trade discount. He however contended that the goods in question were not sold for a wholesale cash price, less trade discount, at the time and place of importation within the meaning of S. 30, sub-s. (a), Sea Customs Act. Mr. Coltman first contended that the sale between the plaintiffs and their retailers took place at the time when the orders were, according to the evidence of Mr. Corey, placed with the plaintiffs, that is to say, some two or three months before goods could arrive in Bombay. It is, I think, plain that the orders so placed, pursuant to which the plaintiffs themselves ordered goods from the manufacturers, were merely of the nature of agreements to buy and sell, and that they could not and did not become agreements of sale until the goods were manufactured and actually arrived in Bombay.

The question then arises: When did the sales between the plaintiffs and their retailers actually become effective? Did they become effective at the time and place of importation, it not being disputed that they were sales of a wholesale character? The evidence of Mr. Corey is that the prices were not fixed at the time the orders were placed, that the prices could be changed by the plaintiffs as they liked, that they were from time to time changed and were published in price-lists which were available to persons in the trade. According to Mr. Corey, the price became fixed on the arrival of the goods, and the retailers who had placed orders with the plaintiffs knew what the price payable by them was on arrival by looking at the published price-list, which was the price-list in circulation at the time of the arrival of the goods; and according to Mr. Corey, the price becoming payable on arrival, no delivery would be effected of the goods until

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that price was paid. That being so, it seems to me clear that the sale became an effective sale upon the arrival of the goods, and the appropriation of those goods to the orders with the assent of both the parties, and the payment of the price by the retailers. The evidence further is that the price was paid within two or three days of the arrival, and delivery was effected on payment of the price. In Bombay delivery was effected by sending the cars to the place of business of the distributors. If delivery was to retailers in other places delivery was effected by sending the cars to the railway station in question, the price-list showing that delivery was F.O.R. Bombay. That being the course of business, can that sale properly be described as a wholesale cash price at the time and place of importation? Mr. Coltman has contended that the sale must be one ex-ship, and that if anything remains to be done after the goods are actually put on the wharf, the sale cannot be said to be a sale at the time and place of importation. He says that delivery had to be effected by the plaintiffs to some place other than the wharf, and that that fact prevents the transaction being a wholesale transaction for a cash price at the time and place of importation. There is, however nothing in the judgment of their Lordships of the Privy Council in the *Vacuum Oil Co.* case (1), to which I have referred, which suggests that unless the transaction is for a wholesale cash price ex-ship, it cannot fall within S. 30, sub-s. (a); and in a decision of this Appeal Court in another case in 47 Bom 174 (2), both Macleod, C. J., and Shah, J., in the course of their judgments assumed that a wholesale disposal of the goods in the town of Bombay itself would fall within S. 30, sub-s. (a). In my opinion, there is no warrant for confining that section to a transaction which is effected merely on the wharf itself. It seems to me that a reasonable construction must be placed upon the words "at the time and place of importation." In the present case, I am of opinion that the wholesale transaction for a cash price was completed at the time the goods arrived in Bombay and at the time the price was paid, that is to say, within two or three days of the actual arrival. It was a transaction entered into pursuant to orders placed on a wholesale basis, which contemplated that the price would be fixed at a future time in accordance with the price-list prevailing at the time of the arrival; and, in those circumstances, the mere fact that the delivery was not made until two or three days after arrival, and to places in the town of Bombay, cannot in my opinion, prevent the transaction from being a wholesale transaction for cash, at the time and place of importation.

Mr. Coltman has argued that S. 30, sub-s. (a), is intended to apply only to what he calls, staple article such as rice, sugar and so forth, and that the goods which are the subject matter of this case, namely, motor cars, are not of the class of goods which would fall within the sub-section. He relies on a passage in the judgment of their Lordships of the Privy Council in 59 I A 258 (1), above referred to, which is in these terms (p. 266):

> The wholesale cash price primarily in view is, they cannot doubt, that price current for staple articles, the amount of which, if not a subject of daily publication in the press, is easily ascertainable in appropriate trade circles.

Mr. Coltman has argued that you could not easily ascertain the price at which motor cars of this description were saleable. In my opinion, that is not in accordance with the evidence. The evidence is that price-lists were published from time to time and that they were accessible to the traders; and, in my opinion, it is quite clear on that evidence that any retailers, who were desirous of placing orders with the plaintiffs, were in a position to know what prices were prevailing at the time they placed the orders, and also knew that if there were any variations in the price-lists at the time when the goods arrived, that would be the price which they would have to pay. I can see no reason why a wholesale cash price so ascertainable should not fall within the terms of S. 30, sub-s. (a). Next Mr. Coltman contended that there was no wholesale cash price at the time and place of importation in the case of the motor-cars in question, because, as he contended, that price was loaded by post-importation charges. First he referred to the cost of assembling the motor-cars on arrival; but it is to be observed that the cost of assembling the motor-

2. Vacuum Oil Co. v. Secy. of State, 1922 Bom 12=67 I C 267=47 Bom 174=24 Bom L R 198.

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cars was already included in the price itself beforehand. The plaintiffs conceded that there was an obligation upon them to deliver an assembled motor-car, but as it was inconvenient for them at that time to assemble the motor-cars themselves, with the assent of the purchasers, they made them an allowance for assembling the cars. The wholesale sale was already complete before the question of the assembling of the cars arose, and the prices had been paid. In my opinion, the fact that there was subsequently an allowance for the assembling of the cars and that the cars had to be assembled cannot prevent the price, which had already been paid, from being a wholesale cash price at the time and place of importation. In my opinion, no question of overloading the price by any post-importation expenses arises in connection with the assembling of the parts of the cars.

Next, Mr. Coltman contended that the price was not a wholesale cash price at the time and place of importation, because it included a part of the overhead charges of the plaintiffs, which were necessarily referable, as he said, to what took place after the cars were imported. He said there would have to be advertisements, that the plaintiffs would have to maintain their office, and charges and expenses would thus have to be incurred and that they were referable to the wholesale cash price as between the plaintiffs and the defendant in this case. In my opinion, there is no warrant for that argument. The course of business as established by evidence, in my opinion shows that the plaintiffs maintained an establishment in Bombay and received orders from various customers for the purpose of enabling them to place orders with the manufacturers in Canada; and, in my opinion, all the overhead charges which were referable to the transaction between the plaintiffs and the defendant in this case had in fact been incurred before the arrival of the goods in this country. The wholesale cash price at the time and place of importation was in fact paid on the arrival of the goods; and, in my judgment, no charges, overhead or otherwise, were incurred by the plaintiffs subsequently in reference to the transaction in question. The price-lists, which were issued by the plaintiffs themselves, in my opinion, themselves afford excellent evidence of the fact that there was a wholesale cash price at the time and place of importation. Those price lists show that the price was a net price, F.O.R. at the main ports of entry. They state the prices at which the retailers were allowed to sell to their customers; they state the discount of twenty per cent; and they state the distributors' net price payable as mentioned after deducting the allowances which the plaintiffs were prepared to make to the retailers in respect of the assembling of the cars. Those price lists themselves appear to me to show, on the face of them, a wholesale cash price; and the evidence establishes, as I have already said, that the transaction was complete on the arrival of the goods and the price paid within two or three days thereafter.

The learned trial Judge was of opinion that the Customs authorities had not made to the plaintiffs appropriate allowances in respect of certain overhead charges and cartage charges. The plaintiffs complain that the learned Judge was wrong in entering into the mathematical calculations as a result of which he said that the Customs authorities ought to have fixed the appropriate customs duties. The defendants also complain, by cross-objections, that the learned Judge was not entitled to come to the conclusion that the Customs authorities ought to have made those deductions. I can myself see no warrant whatever for those deductions. Either the price at which the plaintiffs sold the goods was a wholesale cash price at the time and place of importation, or it was not. If it was, then it is permissible to conclude that goods of a like kind and quality were capable of being sold at that price. But, in my judgment, it is not permissible to say that if the goods have been sold at a price, which was different from the price at which they were in fact sold, and was ascertainable only by certain mathematical calculations and deductions, that goods of a like kind and quality were capable of being sold at that price. There is no evidence whatever that goods of a like kind and quality were capable of being sold at a price fixed in this manner by the learned Judge. In my opinion, there was no justification for his holding that those deductions ought to have been made. I therefore think that the appeal must be dismissed with costs,

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the cross-objections allowed with costs, and the suit dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1936 Bombay 363

BEAUMONT, C. J. AND RANGNEKAR, J.

Manubhai Chunilal and *others*—Plaintiffs—Appellants.

v.

General Accident Fire and Life Assurance Corporation, Ltd. — Defendants — Respondents.

O. C. J. Appeal No. 34 of 1935, Decided on 23rd March 1936.

(a) Succession Act (1925), S. 292 — "Full amount recoverable in respect of any breach of the bond"—Meaning.

The words "the full amount recoverable in respect of any breach of the bond" merely mean the loss for which the obligors under the bond are liable. [P 365 C 2]

(b) Limitation — Administration bond — Suit by assignee, under S. 292, Succession Act, to enforce bond — Suit is governed by Art. 120 and not by Art. 68, Limitation Act.

A suit to enforce an administration bond taken in the name of an officer of the Court for the security of those interested in the due administration of the estate, under the provisions of Ss. 78 and 79, Probate and Administration Act, or Ss. 291 and 292, Succession Act, by a person to whom it has been assigned under S. 292, is not a suit merely on the bond, but is a suit on the bond coupled with the statutory assignment or proof of title to the estate and is governed by Art. 120 and not by Art. 68, Lim. Act: 33 *All* 414; 33 *Cal* 713 (*F B*); 35 *Cal* 955 (*P C*), *Ref.*; 1924 *Rang* 68 and 1914 *L B* 261, *Dissent.* [P 365 C 1]

(c) Succession Act (1925), S. 292—Assignment under S. 292 confers substantive rights and independent cause of action.

Section 292 does not deal merely with procedure of assignment, but confers substantive rights on the assignee, and the assignee acquires by virtue of the assignment a fresh and independent cause of action, limitation running from the time the assignment is made. [P 365 C 2]

V. F. Taraporewala and *N. P. Engineer*—for Appellants.

D. N. Bahadurji and *K. McI. Kemp*—for Respondents.

Beaumont, C. J. — This is an appeal from a decision of Blackwell, J. The plaintiffs are suing the defendants as the sureties upon an administration bond, and the learned Judge dismissed the suit on a preliminary issue of limitation. The facts are not in dispute. On 21st October 1920, one Chunilal Motilal died intestate, leaving two minor sons, who are the plaintiffs. On 14th July 1921 leave was given to Nathalal Motilal to apply for letters of administration. On 24th November 1921 the said Nathalal Motilal, and the defendants, as sureties, entered into a bond, which is Ex. A, for payment to Pheroz Behramji Malabari, Registrar of this Court in its Testamentary and Intestate Jurisdiction, and William J. Howard, acting Assistant Prothonotary, their executors, administrators and assigns, of the penal sum of Rs. 1,76,682, which was double the value at which the estate was sworn. The conditions of the bond which was in the usual form, were, first, that Nathalal Motilal should make a true and perfect inventory of the estate of the deceased Chunilal Motilal, and file it in Court; secondly, that he should well and truly administer all property of the deceased coming to his hands; and thirdly, that he should duly account for his administration.

In the year 1929 Nathalal Motilal died, and the date of his death has been assumed as 31st December 1929. On 10th June 1931, plaintiff 1 attained his majority, and on 7th September 1933, plaintiff 2 attained his majority. On 10th May 1934, the Testamentary Judge made an order for the assignment to the plaintiffs of the administration bond, and on 1st June 1934, the bond was duly assigned by the officers of this Court, in whom it was then vested, to the plaintiffs. This suit was filed on 6th June 1934. The learned Judge held that the suit was a suit upon a bond subject to a condition, and was governed by Art. 68, Lim. Act, that the conditions of the bond had been broken at the latest on the death of Nathalal, and that in consequence all rights under the bond had become barred by limitation at the date of the assignment of the bond to the plaintiffs, and that the plaintiffs' suit was, therefore, time barred. If the decision is right, the operation of the Limitation Act has produced an unfortunate result, and the practice of this Court in relation to administration bonds would seem to require revision. The object of all statutes of limitation is to penalise persons who sleep upon their rights, and exceptions are always made in favour of persons under disability and unable to enforce their rights. An administration bond is taken in the name of officers of the Court for the security of those interested in the due administration of the estate. It is not contem-

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plated that the officers of the Court will themselves take action to enforce the bond, and they are usually not in a position to know when the conditions of the bond have been broken. It would certainly be unfortunate if persons beneficially entitled to an estate misappropriated by an administrator find, on attaining majority, that their rights on the bond are barred because an officer of the Court has omitted to take action, which it was never in contemplation that he would take. In my opinion, however, the decision of the learned Judge is not correct.

The decision having been given upon a preliminary issue, the dates of the alleged breaches of the conditions of the bond have not been ascertained. The Advocate-General, on behalf of the defendants, admitted that Nathalal died on 31st December 1929, and the learned Judge assumed from such admission that all possible breaches of the bond must have occurred before that date, though that fact was not admitted by the plaintiffs. In my opinion we cannot make such an assumption. The principal obligation under the bond was to administer the estate well and truly, and it seems to me impossible to say that that condition was necessarily broken until some person, who was able to give a valid discharge for the estate, claimed it from the administrator or his representatives, and failed to obtain it. That date did not arise until, at any rate, plaintiff 1 attained his majority, which was less than three years before the suit was filed. So that even upon the assumption that Art. 68 applies to the case, it is, in my opinion, impossible to hold on a preliminary issue that the suit is barred by limitation. Apart from that, however, in my opinion, the suit is not governed by Art. 68, and to explain my reasons for so holding, it is necessary to refer to the law relating to the taking of administration bonds. By Cl. 45, Letters Patent, dated 8th December 1823, founding the Supreme Court of Bombay, it is provided that every person to whom letters of administration shall be committed shall give sufficient security by bond to the Registrar or Chief Clerk of the Supreme Court for the payment of a competent sum with two or more able sureties. By Cl. 46 it is enacted that to put the bond in suit for the sake of obtaining the effect thereof for the benefit of any person interested therein, such person shall, by order of the Court, be allowed to sue for the same in the name of the obligee, and that the bond shall not be sued in any other manner. The powers of the Supreme Court were transferred to this Court by Cl. 34, Letters Patent of 26th June 1862. It is clear, however, that the present suit is not a suit founded on the Letters Patent, because it is not brought in the name of the original obligee, but in the name of the person interested in the estate.

The other powers of this Court relating to the grant of administration bonds are now contained in Ss. 291 and 292, Succession Act of 1925, which are substantially in the same terms as Ss. 78 and 79, Probate and Administration Act, 1881. S. 291 provides that every person to whom any grant of letters of administration is committed shall give a bond to the District Judge with one or more surety or sureties engaging for the due collection, getting in and administering the estate of the deceased. S. 292 provides that the Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as the Court may think fit, assign the same to some person, his executors or administrators, who shall thereupon be entitled to sue on the said bond in his or their own name or names as if the same had been originally given to him or them instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustees for all persons interested, the full amount recoverable in respect of any breach thereof. The expression "District Judge" is defined as meaning the Judge of a principal civil Court of original jurisdiction, and the provisions of the Succession Act and the earlier Acts which those provisions replaced have always been treated by the High Courts in India as extending to them. In Calcutta it appears from the case in 33 Cal 713 (1) affirmed by the Privy Council in 35 Cal 955 (2), that administration bonds under

1. Debendra Nath Dutt v. Administrator-General of Bengal, (1906) 33 Cal 713=10 C W N 673=3 C L J 422 (F B).
2. Debendra Nath Dutt v. Administrator-General of Bengal, (1908) 35 Cal 955=35 I A 109 =12 C W N 802 (P C).

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S. 291 are taken in the name of the Chief Justice as corresponding as nearly as may be in the High Court to the District Judge as defined in the Act. In this Court it has been the practice for many years past to take administration bonds in the names of two officers of the Court, the view no doubt being that it is generally prudent to place valuable securities in the names of two persons rather than in the name of one. The taking of the bond in the name of the Chief Justice, or of a Judge, is a ministerial act, which, I apprehend, can be delegated to a Subordinate Officer.

I feel no doubt, therefore, that in the present case the bond was taken in the names of officers of the High Court pursuant to the provisions of the Probate and Administration Act, 1881, which are re-enacted in Ss. 291 and 292, Succession Act, 1925, and the question is whether a suit on a bond so taken falls within Art. 68, Lim. Act. I agree that such a bond is a bond upon a condition, but I do not agree that a suit to enforce the bond by a person to whom it has been assigned under S. 292 is a suit upon a bond within the meaning of the article. In my opinion an assignment under S. 292 is not a mere link in the title to the bond but confers substantive rights upon the assignee. The assignee need not be a person entitled to the whole, or indeed any part of the estate. He is entitled to sue in his own name as if the bond had been originally given to him and all moneys which he recovers under it he holds as trustee for the persons interested in the estate.

If the plaintff sued on the bond relying on the assignment as a mere link in his title, he might be met with the defence that the obligees under the bond were mere custodians of it, and had no power to assign it without consideration to a third party. In order to meet such a defence the plaintiff would have either to rely on the statutory rights and obligations conferred and imposed upon him by the assignment, or else to prove his title as the person beneficially entitled to the estate. In either case his suit is not a suit merely on the bond, but is a suit on the bond coupled with the statutory assignment or proof of title to the estate, and the case seems to me to fall under Art. 120, and not under Art. 68. I am not prepared to agree with the case in 1 Rang 463 (3) on which the learned trial Judge relied.

I am further of opinion that whatever article of the Limitation Act applies S. 292, Succession Act, provides a new starting point of time for the purposes of limitation. The assignee under S. 292 is entitled to sue on the bond and to recover the full amount recoverable in respect of any breach thereof. The learned trial Judge considers that S. 292 deals merely with procedure, and confers no substantive right, and that the words "the full amount recoverable in respect of any breach thereof" mean the amount recoverable in law at the date of the assignment and as in his opinion the right of the original obligees to recover under the bond had become barred at the date of the assignment, the plaintiffs in terms of the section can recover nothing thereunder. In my opinion that is not the right construction to place upon the section, which expressly provides that upon the assignment being made, the assignee may sue in his own name and recover upon the bond. The learned Judge ignores this provision and holds that the assignees in the present case cannot sue or recover anything upon the bond. What may be recovered is "the full amount recoverable in respect of any breach of the bond" which in my view merely means the loss for which the obligors under the bond are liable. If that is the right meaning of the section, the assignee acquires by virtue of the assignment, a fresh and independent cause of action. I do not agree with the learned Judge's view that S. 292 deals only with procedure. As I have already pointed out, it seems to me to confer substantive rights, and I see no reason why the Legislature should not have intended by such section to provide a new starting point for purposes of limitation. It must have been apparent to the Legislature that even if the District Judge has power to sue to enforce the bond under S. 291, (as I think he had notwithstanding the argument of the appellants' counsel to the contrary), it was in the highest degree improbable that he would ever exercise such power, and thereby incur the risk of having to pay costs. It must have been apparent to the Legislature that the normal, if not

3. Maung San U v. Maung Kyaw Mye, 1924 Rang 68=76 I C 802=1 Rang 463.

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universal, method of enforcing the bond would be under S. 292, and it would be in accordance with the principles underlying the Limitation Act to provide that time should run against the persons suing on the bond from the moment at which they first acquired a right to sue. It was argued by Mr. Bahadurji for the defendants that to attribute that meaning to S. 292 might involve hardship upon a surety, because an adult beneficiary might delay for many years obtaining an assignment. But the answer to that is that the District Judge is not bound to assign the bond, and if he was satisfied that the persons interested in the estate had been guilty of unreasonable delay in applying for an assignment, he could refuse to sanction it. For the above reasons I am of opinion that the plaintiffs' right to sue is not barred by limitation, and that this appeal must be allowed with costs, and the suit remitted to the lower Court to be dealt with on the merits. Respondents to pay costs of the preliminary issue as to limitation in the lower Court, and of the appeal.

Rangnekar, J.—This appeal is taken from a judgment of Blackwell, J., dated 4th July 1935, dismissing the action. The question raised by the appeal is of considerable importance and relates to the exact nature and scope of an administration bond taken by the High Court in its Testamentary and Intestate Jurisdiction before the grant of letters of administration to a person, and the period of limitation within which an action to enforce the bond has to be brought. The facts shortly stated are as follows: One Chunilal Motilal died intestate on or about 21st October 1920, leaving him surviving two sons, the plaintiffs as his only heirs and next-of-kin and leaving considerable moveable property. The plaintiffs were minors at the date of the death of their father. Plaintiff 1 attained majority or on about 10th June 1931, and plaintiff 2 on or about 7th September 1933.

On or about 22nd July 1921, the plaintiffs' uncle Nathalal applied to this Court for letters of administration to the estate of the deceased for the use and benefit of the plaintiffs limited until either of them attained majority. In the schedule to the petition the properties left by the deceased were shown as being of the net value of Rs. 87,240-13-3 and consisted of shares in joint stock companies, moneys due under a life policy, cash and deposits in banks, and a share in a firm known as Mahasukh Chandulal & Co., and subsequently in the firm of Mahasukh Tyebally & Co , who were the successors and assigns of Mahasukh Chandulal & Co., in which the deceased was a partner. On the said petition it was directed that letters of administration should issue to Nathalal upon sureties being justified for the whole of the estate and an administration bond being filed, duly signed by such sureties and Nathalal. On 24th November 1921, Nathalal and the defendants as sureties executed an administration bond for payment of the penal sum of Rs. 1,76,682 in favour of Mr. P. B Malabari, the then Testamentary Registrar of the Honourable Court, and Mr. William J. Howard, the then acting Assistant Prothonotary, their executors, administrators and assigns, subject to the conditions therein mentioned, and on 19th December 1921, letters of administration to the estate of the deceased were issued to Nathalal. The letters of administration show that they were granted to Nathalal on behalf of the plaintiffs, the minor sons of the deceased for their use and benefit and limited until either of them should attain majority, Nathalal having undertaken to administer the estate and to make a full and true inventory of the property and credits and exhibit the same in this Court within six months from the date of the issue, or within such further time as may be extended by the Court, and also to render to this Court a true account thereof within one year from the same date, or within such further time as may be extended in that respect by the Court. By the administration bond Nathalal and the defendants and their heirs executors and administrators bound themselves jointly and severally to pay to the obligees the penal sum of Rs. 1,76,682 upon the conditions therein stated, and the obligation of the bond was to be void upon the conditions being fulfilled. The conditions of the bond were as follows:

(1) That Nathalal should make or cause to be made a true and perfect inventory of all and singular the property and credits of the deceased which had or which might come to the hands, possession or knowledge of Nathalal or of anyone for him and exhibit or cause to be exhibited such inventory unto this Honourable Court at or before 24th

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November 1922. (2) That Nathalal should well and truly administer according to law all the property and credits of the deceased. (3) That Nathalal should make or cause to be made a true and just account of his administration at or before 24th November 1922. (4) That Nathalal should deliver and pay up to such person or persons as should be lawfully entitled thereto all the rest and residue of the property and credits of the deceased which should be found remaining upon the account, such account being examined and allowed by this Honourable Court.

Nathalal died in 1929. At the hearing of the suit it was agreed that the date of his death should be taken to be 31st December 1929. The plaintiffs alleged that Nathalal failed to file an account or inventory and to administer the estate and distribute the residue of the estate among the plaintiffs as required by law and in accordance with the conditions of the bond. After Nathalal's death the firm of Mahasukh Tyebally and Company were adjudged insolvents on or about 9th June 1930, and in the schedule filed by them in insolvency a sum of Rs. 58,087-1-0 was shown as being due to Nathalal. As a result of the scheme of composition in the insolvency proceedings, a sum equal to five annas in the rupee of the amount of the claim of each creditor was distributed among them. The trustee appointed under the scheme applied to the Court in its insolvency jurisdiction for directions regarding payment of dividend in respect of the sum of Rupees 58,087-1-0 by a notice of motion, dated 13th January 1932. Plaintiff 1 was served with the notice and made an affidavit in which he stated that without prejudice to the plaintiffs' claim against the defendants, plaintiff 1 was willing to receive the amount of the dividend. On 19th January 1932, an order was made directing the trustee to pay Rs. 9,076-4-0 to plaintiff 1 and a similar sum to the Accountant-General for the benefit of plaintiff 2. The plaintiffs had thus received Rs. 18,142-8-0, and the balance of about Rs. 40,000 is lost to the plaintiffs who alone are entitled to the estate of the deceased.

On 10th May 1934, the plaintiffs applied to this Court in its Testamentary and Intestate Jurisdiction for the bond being assigned to them. A chamber summons was served on the defendants, and their attorneys wrote to the plaintiffs to the effect that the claim of the plaintiffs under the administration bond was barred by the law of limitation. The defendants did not appear at the hearing of the chamber summons. An order was made on 10th May 1934, and the summons was made absolute. The order directed that on the assignment the plaintiffs or their heirs, executors or administrators should be entitled to sue on the administration bond in their name or names as if the same had been originally given to them, and should be entitled to recover thereon as trustees or trustee for all persons interested in the full amount recoverable in respect of any breach of the administration bond. Accordingly a deed of assignment was executed by Mr. Malabari and by Mr. Patel, the Prothonotary of this Court, on 1st June 1934. The deed of assignment recited the facts and the order made on the chamber summons to which I have referred. It then stated that "in consideration of the premises the assignors hereby assign unto the assignees jointly as well as severally and their and each of their heirs executors and administrators" the said bond and the sum secured thereby. Upon this deed of assignment the plaintiffs brought the suit which has given rise to the present appeal.

The defendants put in a written statement raising various contentions, one of which was that the suit was barred by the law of limitation. The suit came on for hearing on 1st July 1935, and after the issues were raised the defendants' counsel asked the Court to try the issue as to limitation as a preliminary issue. He submitted that on the allegation in the plaint the suit was barred. Counsel for the plaintiffs submitted that the whole suit might be tried first. The learned Judge made the following order:

P. C.—I will deal with limitation, on the assumption, for that purpose, that the allegations in the plaint are accurate.

Upon that certain necessary documents were tendered by counsel for the plaintiffs, and in the result the learned Judge dismissed the action holding that the claim was barred under Art. 68, Lim. Act. The first question which arises is, under what provision of the law was the bond taken and assigned to the plaintiffs? By Cl. 45 of the Letters Patent establishing the Supreme Court, administra-

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tors were to give security by bond for duly administering the effects of the deceased, and the conditions of the bond are set out in the clause and they are the same as those in this case. Cl. 46 provided that in case it should be necessary to put the bond in suit for the benefit of any person or persons who should appear to the Supreme Court to be interested therein, such person or persons from time to time paying all such costs as should arise from the said suit or any part thereof. Such person or persons should, by order of the Court, be allowed to sue the same in the name of the obligee, and the bond was not to be sued in any other manner, and the Supreme Court was authorized and empowered to order the bond to be put in suit in the name of the Registrar or Chief Clerk, or his executors or administrators. By the Letters Patent of 1862 all the powers of the Supreme Court were transferred to the newly constituted High Court, but these provisions of law were left unaffected, as also by the Amended Letters Patent of 1865, which is the Charter which now regulates the jurisdiction of this Court. However, by Cl. 44 of the Letters Patent of 1865 all the provisions of that Charter were made subject to the legislative authority in British India and the Indian legislature were given power to amend or alter any of the provisions of the said Letters Patent.

It will be seen from these clauses that the bond was to be taken in the name of the Registrar or the Chief Clerk, and that the only way in which it could be enforced or "put in suit" was to sue in the name of the Registrar or the Chief Clerk. The Registrar was the nominal plaintiff. The suit however was to be conducted by the person beneficially interested at his expense, and he was to indemnify the Registrar or the Chief Clerk for his costs. Now in the same year in which the Amended Letters Patent were issued i. e., in 1865, the Indian Legislature enacted the Succession Act 10 of 1865, S. 256 of which provided for the taking of the administration bond and under S. 257 provision was made for the first time for the assignment of such bond to the person or persons interested who could sue on it in his or their own name or names instead of the officers of the Court suing on such bond. That Act did not apply to the Hindus, but in 1881 the Probate and Administration Act 5 of 1881 was passed, which applied to Hindus, and Ss. 78 and 79 of which were in terms similar to Ss. 256 and 257, Succession Act of 1865. In 1925 both the above Acts were repealed, but the provisions of those Acts were re-enacted in one consolidated Act, which applied to all and which is the present Succession Act 39 of 1925. Accordingly, the provisions of Ss. 256 and 257, Succession Act of 1865, and Ss. 78 and 79, Probate and Administration Act of 1881, were re-enacted in Ss. 291 and 292 of the Act of 1925. Now the parties in this case being Hindus and the letters of administration having been granted in 1921, the administration bond was executed under the provisions of Ss. 78 and 79, Probate and Administration Act, which was then in force; but as the Court below and counsel have referred to the sections of the Succession Act of 1925 throughout, I shall in the course of the judgment refer to them. S. 291 provides:

(1) Every person to whom any grant of letters of administration, ... is committed, shall give a bond to the District Judge with one or more surety or sureties, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge may, by general or special order, direct . . . . .

Section 292 provides:

The Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as the Court may think fit, assign the same to some person, his executors or administrators, who shall thereupon be entitled to sue on the said bond in his or their own name or names as if the same had been originally given to him or them instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustees for all persons interested, the full amount recoverable in respect of any breach thereof.

Under S. 291 the bond is to be taken in the name of the District Judge. The term "District Judge" is defined in S. 2 of the Act as the Judge of a principal civil Court of original jurisdiction, and the term "District Judge" has been construed by a long chain of decisions of the High Courts in this country to include a High Court Judge within the presidency-towns. Now, the bond in this case is in the name of two officers, namely, the Registrar of the Court in its testamentary and intestate jurisdiction, who also was the Prothonotary at that time, and the Assistant Prothonotary. So that it does

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not appear to be either under the Charter or under the Succession Act. Assuming however that the bond was issued under the Charter, the difficulty would arise that the suit is not in the name of the Registrar as the Charter requires, and further the Charter does not provide for assigning the bond to anyone. Mr. Taraporewala contends that the bond was properly taken under the Succession Act, and in accordance with the practice of the Court in the name of two of the senior officers of the Court. Mr. Bahadurji contests this position and says that the bond was taken under the Charter.

Now it is clear that the Succession Act by Ss. 291 and 292 does not take away the power of this Court to take the bond in the name of the Registrar. Reading both the statutes together, it seems to me that the Succession Act simply gives an additional power to the High Court to take the bond in the name of the Judge and the power to assign it to any person. Accordingly, the Calcutta High Court by R. 749 directed that the letters of administration should be granted to a person, such person having first executed the usual bond to the Registrar with two or more sureties in such sums as shall be deemed adequate to the value of the estate affected. In spite of the rule however in Calcutta the bond is being taken in the name of the Chief Justice as being more in accordance with the statutory provision contained in the Succession Act, the Chief Justice being considered the representative of the High Court which, so far as its original jurisdiction is concerned. is the District Court referred to in the section, and it was held in 33 Cal 713 (1) that the practice was not irregular. In that case it was argued as here that the bond ought not to have been taken in the name of the Chief Justice. Dealing with that contention, Maclean, C. J. observed as follows (p. 738):

It is said in the first instance that the bond ought not to have been taken in the name of the Chief Justice. It is questionable whether it is open to the sureties, seeing that they themselves have executed this bond, upon the faith of which letters of administration issued to Cowie, to raise this point. There is nothing substantial in it. Under S. 256, Succession Act, the bond is to be given to the Judge of the District Court, and in the case of applications on the Original Side of this Court, that must mean to a Judge of the High Court. Formerly it was the practice to take the bond in the name of the Registrar, but the matter was enquired into by Sir Richard Couch when Chief Justice, and it was decided that, having regard to the language of S. 256, the bond should be given to a Judge of the Court instead of to the Registrar, and ever since the practice has been to take it in the name of the Chief Justice. This practice has continued for 30 or 40 years.

In Madras the practice, as I understand, has always been to take the bond in the name of the Registrar. In our own Court, as the records extant show, since 1867 the practice has been to take the bond in the name of the Registrar, but since 1901 the practice was altered and it was directed that it should be taken in the name of the Prothonotary and the Assistant Prothonotary. It was felt that difficulties might arise if the Prothonotary was on leave and was not available and hence it was directed that the bond ought to be taken in the name of the Prothonotary and the Assistant Prothonotary. The question now is, whether the High Court could delegate its power to its ministerial officers. There can be no doubt that this power exists. Cl. 8 of the Charter governing the High Court provides for the appointment of ministerial officers "for administration of justice and due execution of all the powers granted and committed to the High Court by the Letters Patent." The Government of India Act, S. 106, gives the same powers and a further power to make rules relating to the practice of the Court. As far as possible, the Civil Procedure Code is to be applied on the Testamentary Side, and S. 129 of the Code gives power to the High Court to make rules to regulate this practice. The present R. 630 (O. S. Rules and Forms, 1936), which corresponds to the old R. 593, provides:

In all cases of letters of administration save and except under S. 241, Succession Act, 1925, unless the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jain and in cases of succession certificates which in the opinion of the Prothonotary and Senior Master fall under sub-ss. 3 and 4, S. 373 two common sureties are required to the administration bond (Form No. 103) and to the succession certificate bond (Form No. 105) and the bond in each case is to be given in double the amount of the property for which the grant is to be made. Such bond in all cases shall be prepared in the Registry. (Form No. 103 or 105.)

Form No. 103 shows that the bond is to be taken in the name of the Prothonotary and the Assistant Prothonotary. The position, therefore, is clear; but it may be desirable that in order to leave no doubt on the point a rule may be framed to put the practice on a firm footing. Under the present practice the

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bond is taken under the Indian Succession Act in the name of its ministerial officers, and there is nothing wrong about it. In my opinion, apart from that, as pointed out by Maclean, C. J., it hardly would lie in the mouth of the surety who has executed the bond to raise any objection as to its regularity. Having regard to the conclusion to which I have come on the main question of limitation, it makes not the slightest difference whether the bond is treated as being taken under the Charter or under the Act. The question has been raised as to whether the suit is to be brought in the name of the District Judge. Technically, of course, the District Judge can sue, but in practice he never does; for one thing, the District Judge can rarely know whether the conditions of the bonds are kept or not, and I do not think it was ever intended that the District Judge was himself, or the Court officers in whose name the bond was taken were themselves, to take action to enforce the bond. The whole scheme, whether under the Charter or the Indian Succession Act, is that the bond is taken in the interests of the persons beneficially entitled to the estate, and somebody has to move the Court to take action in the matter. The only intention of the legislature is to safeguard the interests of the persons entitled to the estate. It is obvious that serious difficulties would arise if it were held otherwise. Mr. Taraporewalla argues that the bond being given to the District Judge in his official capacity, if he sues, the suit will have to be brought in the name of the Secretary of State, and in that case limitation would be sixty years under Art. 149. There is considerable force in the argument, but I do not think it necessary to pursue the point, as here the suit is on an assignment.

Having cleared the ground of some of the points discussed at the bar, I now turn to the main question of limitation. The question is, when is the bond to be assigned, for upon that the question as to what article of the Indian Limitation Act can apply depends. Now, it is clear that until there is a breach of the condition of the bond the right of the creditor (I will use that expression for brevity's sake) cannot come into existence. When then can it be said that breach has occurred in such a case? Now, it is clear that there are at least four conditions laid down in the bond, and they correspond to the duties which the person to whom letters of administration are granted has to perform. An administrator under the administration bond has to do the following acts:

(1) To file an inventory showing assets and liabilities; (2) to file an account showing the assets which have come into his hands, and the manner in which they have been disbursed; (3) to administer the estate properly: and (4) to pay the residue to the person entitled.

These duties generally correspond to the duties laid upon an administrator in Ch. 7, Succession Act of 1925, and it is clear that until they are carried out the administration is not at an end. Now, a breach of any one of the conditions may justify the enforcement of the obligation under the bond. In practice, however, the first two conditions are rarely regarded or fulfilled. The condition to administer the estate and pay the residue to the person entitled to it, that is to the beneficiary, is, in my opinion, a vital condition. An administrator may delay the filing of an inventory or account, but if he pays to the beneficiary all that he is liable to pay, then there can be no question of enforcing the bond. Therefore, in my opinion, a breach of the condition of the bond generally takes place when the administrator converts the estate to his own use or misappropriates the same, or in other words when the estate is lost to the beneficiary; it is then that the condition of the bond is broken in its entirety, and until such a breach occurs, the obligation under the bond is not incurred. This seems to me to be the effect of the conditions and the principle on which the whole letter of administration is based. See (1832) 1 Cr & M 181 (4). Then, again, it is clear that when a bond contains successive covenants, each breach gives a separate cause of action; but the date of the last breach is the starting point of limitation in a suit on the bond, when the bond is conditioned on the performance of several acts and the obligation to pay is enforceable till the last and the most important of the conditions is not fulfilled.

A continuing breach would apply only to contracts obliging one of the parties to

4. Archbishop of Canterbury v. Robertson, (1832) 1 Cr & M 181=3 Tyr 419=3 L J Ex 101.

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adopt some given course of action during the continuance of the contractual relations. If this is correct, the death of the administrator would make no difference. In law the estate of an administrator would be liable to make good the loss, and if it does, then it is difficult to see how it can be said that the loss has occurred or the condition of the bond is broken so as to start limitation against the persons entitled to the estate. In 4 Rang 358 (5) it seems to have been held that time runs against a surety when the Court ascertains and declares the amount to be accounted for and not even from the date of the alleged misappropriation.

Now in this case the loss occurred on 19th January 1932, when it was realized by plaintiff 1 that the sum of Rs. 40,000 was lost to the estate. That being so, the suit filed on 6th January 1934 would be in time even if Art. 68 applied to the facts of the case. Mr. Bahadurji argues that it was admitted for the purpose of the preliminary question that the cause of action to sue on the bond arose on 31st December 1929, when the administrator died. I can find no warrant on the record to justify this statement. Assuming, however, that the cause of action arose on the death of the administrator on 31st December 1929, still as plaintiff 1 was then a minor, and attained majority on 10th June 1931, the suit will be saved by reason of the provisions of S. 6, Lim. Act, and as there was no person in existence who could give a valid discharge to the administrator.

The fallacy in the argument on behalf of the respondents which seems to have been accepted by the learned Judge, is, that it is the District Judge or the officers who could sue upon the bond. In my opinion, to take that view is to frustrate the intention of the legislature and to ignore the scheme of the Act. The underlying principle is that the person beneficially entitled to the estate has a right to an assignment independent of the right of the person or persons in whose name the bond is taken. S. 292 is not obligatory, and the Court may refuse to assign the bond and would do so if the applicant has been guilty of unreasonable and long delay, and I see no practical difficulty in taking this view of the provisions under the Act. But in my view a suit on a bond given by an administrator under S. 291, Succession Act, is not governed by Art. 68, Lim. Act. The word "bond" is defined in the Limitation Act as including

any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be.

When the condition is broken, a cause of action to sue upon the bond accrues to the obligee forthwith. If the bond is assigned, the assignee has a right to enforce the bond upon a breach of the condition. Is that position possible in the case of an administration bond? Is it open to the beneficiary to proceed against the administrator or sureties straightaway? Both under the Charter and under the Succession Act the beneficiary has to do something before he has a right of suit. He has to apply to the Court for assignment. The Court may or may not assign. Before the Court assigns, the Court making an order has to see that (1) the application is bona fide; (2) a prima facie case is made out; and (3) the applicant is a proper person: See 1 P & D 186 (6). In our Courts the practice is to take out a chamber summons on which the Court orders the officers of the Court to execute a deed of assignment in favour of the applicant upon being satisfied that the engagements of the bond were not kept. The officers then execute a deed of assignment in which the main facts relating to the passing of the bond are set out and the order made by the Judge is recited. Is this then a case of a bond to which Art. 68 would apply? I find considerable difficulty in holding it is. The section, in my opinion, gives a statutory right to the assignee to sue as if the bond had been originally given to him and makes him a trustee of the moneys due under the bond for the persons entitled to the estate. No person entitled to the estate can sue upon the bond except under the provisions of the section. The cause of action is not merely a breach of the condition but something more, namely, obtaining an order which may or may not be given after an enquiry as to whether the obligations of the bond are not kept, and the assignee is not entitled to the

5. Hamadanee v. Ma Shwe Gon, 1927 Rang 28 =98 I C 459=4 Rang 358.

6. In the Goods of Young, (1866) 1 P & D 186= 35 L J P 126=14 L T 634=14 W R 970.

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moneys recovered but has to hold them as a special trustee for somebody else.

The right to sue arises under the section and by virtue of the section. It is difficult to see how to such a suit Art. 68 would apply. Mr. Bahadurji relies on the case in 1 Rang 463 (3) and 26 I C 505 (7). With all respect to the learned Judges who decided these cases, I am unable to agree. In my opinion, there is no specific article in the Limitation Act which would apply to such a case, and that the only article which would apply would be Art. 120; and limitation would run from the date when the right to sue accrues, that is from the time the assignment is made. Until then there is no right to sue on the assignment. This seems to be the view taken in 33 All 414 (8). The learned Judge took the view that S. 292 merely entitled the assignee to recover the full amount "recoverable under the bond," and observed as follows:

Accordingly, the section itself contemplates that at the time of the assignment, there is in law an amount recoverable in respect of the breach.

With all respect the words "recoverable under the bond" refer to and mean nothing more than the main obligation of the administrator set out in the bond itself in these terms:

. . . . shall administer . . . . all the rest and residue of the said property and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed by the High Court of Judicature at Bombay, etc. . . .

that is the amount or residue not accounted for by the administrator and not paid to the persons entitled to the estate. I agree, therefore, that the appeal must be allowed with costs and the case remanded to the trial Court for trial on merits.

V.B./R.K. *Appeal allowed.*

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7. Ahmed Moola Dawood v. Fatima Bee Bee, 1914 L B 261=26 I C 505=8 L B R 99.
8. Kanti Chandra Mukerji v. Ali-i-Nabi, (1911) 33 All 414=9 I C 935=1 A L J 199.

* A. I. R. 1936 Bombay 372

BROOMFIELD AND WASSOODEW, JJ.

Emperor

v.

Motiram Raising— Accused.

Criminal Confirmation Case No. 9 and Appeal No. 131 of 1936, Decided on 30th June 1936, from conviction of Sess. Judge, Nasik.

*** Evidence Act (1872), Ss. 8 and 32—Dying declaration—Gestures of deceased in reply to questions, or questions with gestures are admissible in evidence—Whether under S. 32 or S. 8 doubted.**

Gestures of the deceased in reply to the questions put to her or the questions put to her taken together with her gestures in reply to them, whether the questions are in a leading form or not, are admissible in evidence. It is doubtful whether such gestures, as explained by questions, can be regarded as a verbal statement within the meaning of S. 32 or would be relevant as conduct under S. 8 (Broomfield, J. prefers to hold it admissible under S. 8 and not under S. 32, but Wassoodew, J. holds that it is admissible under S. 32): 7 *All* 385 (*FB*); 1922 *Cal* 409; 1922 *Pat* 535 and 1924 *Lah* 581, *Rel. on.*

[P 374 C 1; P 375 C 1, 2]

P. B. Shingne—for the Crown.

L. P. Pendse—for Accused.

Facts.—One Sita, the wife of Bhika Kashiram, was found mortally wounded in her house at Aundane, on 22nd January 1936. Her throat was cut with a vegetable chopper (vili), and the windpipe was cut into two. Bhika had a distant cousin Motiram by name. The two lived in adjoining houses at Aundane. They were also in the relation of debtor and creditor, Motiram having advanced a loan to Bhika. There was a further complication that Sita and Motiram had been on terms of intimacy for over a year. The intimacy was resented by Bhika. He rebuked Motiram asking him to give it up. It was in vain. Eventually Bhika decided to leave Aundane with his wife. Motiram demanded payment of his loan. This, Bhika was unable to pay. On 19th January 1936, both Bhika and Sita were beaten by Motiram. On 20th January 1936, Bhika and Sita left Aundane and stayed with Bhika's brother Daga at Satana. That very day they made a complaint of the beating to the head constable in charge of the Satana police station. The complaint was entered in the register; and Bhika and Sita had their injuries treated at the dispensary and certified by the doctor in charge.

On 22nd January 1936 it appeared to the Police Sub-Inspector that Motiram had not only beaten Sita but also wrongfully confined her on 19th January. He instructed constable Vaman to proceed to Aundane and verify the allegations. Motiram had meanwhile followed Bhika and Sita to Satana. Vaman left for Aundane accompanied by Sita and Motiram. On reaching Aundane, Vaman went to interview the Police Patil while Sita

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and Motiram went to their respective houses. Shortly afterwards Sita went to the Police Patil's house followed by Motiram. Motiram wanted her to go back with him to compromise the dispute. He was about to drag her away when Vaman intervened and released her from his grip. Vaman took him to his house and left him there, but Motiram returned within a few minutes and forcibly dragged away Sita to her house. On entering he shut himself in with her. The Police Patil and Vaman knocked at the door but found it chained from inside. Peeping through a chink in the door Vaman saw Sita and Motiram sitting on the floor engaged in conversation. As no assistance was forthcoming he and the Police Patil repaired to Satana and informed the Sub-Inspector about Sita's wrongful confinement. Shortly before noon Motiram returned to Satana, and got a petition written addressed to the Sub-Inspector asking for police assistance. The petition mentioned the names of ten persons who, it was stated, had severely belaboured Sita and she was not expected to survive. The petition was not handed to the Sub-Inspector in person but was sent to him by registered post. Meanwhile, the Sub-Inspector, who was told by Vamam of the wrongful confinement of Sita, asked Bhika to go to Aundane and lodge a complaint if the facts reported were true. When Bhika reached the house in the afternoon he found the door chained from outside. On entering his house he found Sita reclining on the floor with her throat cut and bleeding profusely. By her side lay a vili. Bhika locked the door and went to Satana for report. The Sub-Inspector went immediately to Aundane. When he entered Bhika's house with panch witnesses he found Sita reclining on the floor and holding her throat. When questioned as to who had cut her throat she tried to speak and with great effort uttered the word "Moti." When asked further, whether she meant Motiram she nodded assent. She also pointed her finger at the vili and explained by signs that Motiram had cut her throat with it after putting his foot on her chest. Later Sita walked unaided to a bus; and she was taken to the Satana dispensary. The medical officer declared her condition to be critical, and her dying declaration was recorded in the presence of Motiram. Sita had by then completely lost her speech but was conscious and in full possession of her faculties. She answered the Magistrate's questions by signs, and pointing at the accused explained that it was he who had cut her throat with the vili at 10 a. m. The dying declaration when recorded was read over to her and she acknowledged its correctness by a nod.

Sita was then removed to the Malegaon dispensary for better treatment, but there she succumbed to her injuries on the evening of 23rd January. Motiram was on these facts convicted by the Sessions Judge of the offence of murder and sentenced to the extreme penalty of the law. The conviction and sentence came up to the High Court for confirmation. The accused also appealed.

Broomfield, J.—(After setting out the facts of the case as above, his Lordship proceeded.) The learned advocate who appears for the accused in this Court has devoted a large part of his argument to the question of the admissibility of the dying declaration alleged to have been made by Sita to the Magistrate. The Magistrate was examined as a witness and has deposed to the questions which were put by him and to the manner in which Sitabai answered the questions by signs and gestures. The record of the examination is Ex. 14 and is as follows:

Q. Who caused you the injury to your neck?

A. She points out her finger to the accused Motiram alias Tana walad Raising Rajput of Aundane in front of her.

Q. How is the injury caused?

A. She points out at the vili and the accused in front of her and makes signs with her finger on her neck as if cutting with vili.

Q. In what position you were when the injury was caused? Were you standing or sitting?

A. She pointed out at the accused by taking her right leg in her hand and touching her chest with her fingers and makes indication as if the accused fell her down by placing his foot on her and cutting her neck with vili.

Q. At what time this happened?

A. By showing her ten fingers she makes an indication as if this happened at 10 a. m.

It is contended that this evidence is not admissible under S. 32, Evidence Act, or otherwise. S. 32 provides that statements, written or verbal, of relevant facts made by persons who cannot be called as witnesses are relevant facts in certain cases, one of the cases being when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death. Now, apart from authority, I must admit that I should

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greatly doubt whether Sita's gestures in reply to the questions put to her or the questions put to her taken together with her gestures in reply to them, could without straining of language be regarded as a verbal statement made by Sita within the meaning of S. 32. On the other hand, apart from authority, I should myself have thought that her gestures as explained by the questions put to her would be relevant as conduct under S. 8 of the Act, although I must admit that S. 8 is a little difficult to understand, in particular the precise meaning of the expression "influences or is influenced by any fact in issue or relevant fact."

There is no decision of this High Court on the point, but the authority of other High Courts is the other way. That is to say, it has been held that evidence of this kind is admissible under S. 32, not under S. 8. In the oldest case, 7 All 385 (1), the only case in which reasons have been given, the facts were that an injured person had been questioned at considerable length. A large number of questions had been put to her, some of them leading and some not leading, to which she had replied by various signs and gestures. The Sessions Judge had allowed the evidence to be given and the question which was referred to the Full Bench was whether the evidence was admissible. At the commencement of his judgment the learned Chief Justice said that he understood the question submitted to come to this :

> When a witness is called who deposes to having put certain questions to a person, the cause of whose death is the subject matter of the trial, which questions have been responded to by certain signs, can such questions and signs, taken together, be properly regarded as "verbal statements" under S. 32, Evidence Act, or are they admissible under any other sections of the same Act ?

The learned Chief Justice took the view that the evidence was admissible under S. 32 and not S. 8. Two of the learned Judges concurred with that answer. Mahomed, J. though agreeing with the other Judges that the answer to the question referred in the form given to it by the Chief Justice should be in the affirmative, took the view that the case came under S. 8 and not under S. 32. The argument which has been put forward before us is that the majority of the Judges in this Allahabad case made a distinction between (a) leading questions such as "Did *A* inflict the injuries on you ?" answered by a nod, and (b) "Who inflicted the injuries on you ?" answered by pointing to an individual present, and that they held that (a) was admissible as a verbal statement under S. 32, and (b) was not. I can see no logical basis for such a distinction. As I say, my own view, apart from authority, would be that in neither case is there any verbal statement of the person questioned. But if (a) is to be regarded as a verbal statement, I can see no reason why (b) should not. At one passage in his judgment at p. 397, the learned Chief Justice said :

> The same objection which is now made to the admission in evidence of these signs might equally be made to the assent given by a witness in an action to leading questions put by counsel. If, for example, counsel were to ask—"Is this place a thousand miles from Calcutta?," and the witness replied "Yes," it might be said that the witness made no statement as to the distance referred to. The objection to leading questions is not that they are absolutely illegal, but only that they are unfair.

It would almost seem from this passage that the learned Judge was relying on the narrative form which is given to the evidence when recorded. But if any argument could be based upon that, the same argument would apply in the case of the answers by signs or gestures which I have classified under the heading (b). If the question were "Who inflicted the injuries?," and it was answered by pointing to a person named *A*, the record of the evidence, if it were recorded in a narrative form, would be : "*A* inflicted the injuries on me." In the course of the argument our attention was directed to S. 119 of the Act, which says :

> A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

This section has no direct relevance. It deals with statements of witnesses, i.e., persons who are actually examined in Court, whereas S. 32 deals with statements made by persons who cannot be called as witnesses. But perhaps S. 119 has some little importance as suggesting that the framers of the Act were prepared to include answers given by signs in the category of oral evidence. It cannot, of course, be suggested that S. 119 only permits answers to be given by signs to

1. Queen-Empress v. Abdullah, (1885) 7 All 385 =1885 A W N 78 (F B).

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leading questions. I am by no means sure that the distinction which is now suggested was really intended by the learned Judges who formed the majority of the Bench in 7 All 385 (1). In any case that decision has been followed in a number of cases of other High Courts, 49 Cal 600 (2), 1 Pat 401 (3) and 5 Lah 305 (4), and in none of these cases has any such distinction been made. 49 Cal 600 (2) was in fact a case very similar to the present.

The dying 'declaration' which had to be considered merely consisted of evidence to show that three persons were made to stand before the injured person. She was asked to point out which of the three wounded her and she pointed out her husband as the person who wounded her. So far from taking the view that the question put to the woman should have been in a leading form in order to make the answer by signs admissible, the Court said that it was regrettable that the question was put in a form which suggested that the injury was homicidal. So that the Court apparently thought that it would have been better if the questions had not been put in a leading form at all. It would seem that since 1885, if not before, it has been more or less settled law that dying declarations of this kind are admissible under S. 32. Whether under S. 32, or as I should myself rather prefer to hold under S. 8, I think there can be no doubt that the evidence is admissible. (His Lordship then discussed the evidence and the judgment concluded.) We take the view, therefore, that the learned Judge was fully justified in agreeing with the opinion of two of the assessors and in convicting the accused of murder. It is clearly a case in which there can be no sentence but the sentence of death. It was a brutal attack on a defenceless woman and there were no extenuating circumstances. The sentence, therefore, must be confirmed and the appeal dismissed.

Wassoodew, J.—(After narrating the facts of the case, his Lordship proceeded.) There is also evidence of the dying declaration of the deceased. The first indication of that declaration is given in the testimony of Bhika. In his examination-in-chief he distinctly stated that the deceased with great effort said that Moti, meaning the accused, had cut her. He resiled from that statement in his cross-examination in which the answer was extracted that he did not put her any question with regard to her assailant. The Police Sub-Inspector is, however, definite that the deceased in a low voice and with great effort uttered the word Moti when she was questioned as regards her assailant and she also pointed out the sickle with which she was cut. Before the panch she repeated that accusation against Motiram. The dying declaration was then formally recorded by the Subordinate Judge and Magistrate, Ex. 13, at about 4 p. m. that day. The deceased was then unable to speak owing to the nature of her injury. But in reply to questions she indicated by signs that Moti who was present was her assailant, and that the instrument used was a sickle. It is reasonable to suppose that the deceased was unable to speak after she had received the injury. That is also the view of the doctor. Objections have been taken to the admission of these dying declarations on the ground that they cannot be described as verbal statements within the meaning of S. 32, Evidence Act. That point has been considered by a Full Bench of the Allahabad High Court in 7 All 385 (1).

The learned advocate for the accused has tried to distinguish that case from the present one on the ground that the majority deciding that case restricted the admissibility of such declarations only to signs signifying assent or dissent by the dying person upon hearing leading questions put to him. It seems to me that the form of the question cannot affect the admissibility of the signs if such signs are rendered admissible under the Evidence Act. Indeed the question whether such signs are admissible under S. 8 or S. 32, Evidence Act, is not free from difficulty; but I see no reason to differ from the views expressed by the learned Chief Justice in *Abdulla's case* (1) which has been followed without dissent by the Patna, Calcutta and Lahore High Courts since 1885. If the objection was to the interpretation of signs, then unquestionably the interpretation of the person recording the dying declaration would not be admissible.

2. Emperor v. Sadhu Charan Das, 1922 Cal 409 =77 I C 993=25 Cr L J 529=49 Cal 600.
3. Chandrika Ram Kahar v. Emperor, 1922 Pat 535=71 I C 353=24 Cr L J 129=1 Pat 401 =3 P L T 771.
4. Ranga v. Emperor, 1924 Lah 581=84 I C 552 =26 Cr L J 328=5 Lah 305.

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Here the record is full enough to permit the Court to interpret the signs independently. After carefully reading the declaration my own interpretation is that the accused was indicated in no unmistakable way as the assailant of the deceased. The dying declaration, therefore, lends confirmation to the proof available, and I agree with my learned brother that the accused is guilty of the murder of Sita and that the sentence passed on him should be confirmed and his appeal dismissed.

V.B.B./R.K. *Appeal dismissed.*

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BROOMFIELD AND WASSOODEW, JJ.

Dema Mahadu Amberkar—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 72 of 1936, Decided on 17th June 1936, from order of Magistrate, 1st Class, Ratnagiri.

(a) Penal Code (1860), S. 183—Bombay Local Boards Act (1923), S. 100, Rules under, R. 8—Nakedar levying octroi on goods on ship board which has not landed and on refusal of tandel to pay seizing goods under R. 8 — Authority to levy octroi on board of ship not landed not established — R. 8 is ultra vires of S. 100, Bombay Local Boards Act — Tandel resisting Nakedar in taking goods cannot be convicted under S. 183.

A Tandel of a ship carrying goods consigned to various persons in Jaitapur and in Rajapur arrived at the port of Jaitapur at the mouth of a creek. The goods which were consigned to Jaitapur traders were landed, and octroi was duly paid in accordance with the rules made by the District Local Board. There was no separate Naka for Rajapur and the Nakedar of Jaitapur went on board the Tandel's ship and demanded octroi duty on goods which the Tandel was carrying to Rajapur. The Tandel refused to pay and on his refusal the Nakedar acting under R. 8 seized some of the cargo. The Tandel resisted him in his taking the goods and thereupon he was prosecuted under S. 183, Penal Code:

Held: that the District Local Board had no power to make a rule such as R. 8 providing for the collection of the octroi in the same manner provided in the case of a toll by S. 116, Bombay Local Boards Act. It was not established whether the jurisdiction of the District Local Board extended to the goods on board of ship which had not landed. This being so the Tandel could not be convicted under S. 183, Penal Code: *Cri. Revn. Appln. No.* 314 *of* 1932, *Rel. on.* [P 376 C 2; P 378 C 1, 2]

(b) Bombay Local Boards Act (1923), S. 102—Interpretation—S. 102 does not say that rules when sanctioned are to have force of law.

Section 102 does not say that rules when sanctioned under S. 101 are to have the force of law and moreover it cannot be the intention of the Legislature to give legal effect to the rules not covered by the provisions of the Act. [P 378 C 2]

G. C. O'Gorman, Y. B. Rege and *K. B. Joshi*—for Accused.

P. V. Kane—for the Crown.

Broomfield, J. — This case involves some interesting and rather difficult questions as to the powers of the District Local Board of Ratnagiri to levy octroi in respect of goods lying on ship board in port before they have been landed. The applicant was the Tandel or master of a a country ship, which on 20th October 1934, arrived at the port of Jaitapur, at the mouth of a creek in the Ratnagiri District carrying goods consigned to various persons in Jaitapur and in Rajapur, a port some 18 miles farther up the creek. The goods which were consigned to Jaitapur traders were landed, and octroi was duly paid in accordance with rules made by the District Local Board. It appears that there is no separate octroi Naka for the port of Rajapur, and the Nakedar of the Jaitapur Naka went on board the applicant's ship together with a peon and panchas, and demanded from the Tandel the amount of octroi duty, about Rs. 60, on the goods which he was proposing to take to Rajapur. The Tandel declined to pay, firstly because he had not the money to do so, and, secondly because, as he said, the Rajapur merchants objected to pay. On his refusal the Nakedar seized part of the cargo, viz., a bag of black pepper, the value of which, he estimated, would be sufficient to pay the amount of octroi duty. He was proceeding to weigh the bag of pepper, when the Tandel obstructed him and took the bag away. After that he sailed up the river to Rajapur, and it is admitted that the goods were subsequently landed there. The Tandel was prosecuted for an offence under S. 183, I. P. C., that is, for the offence of resistance to the taking of property by the lawful authority of a public servant. He was convicted by the First Class Magistrate, Ratnagiri, and sentenced to pay a fine of Rs. 51. On appeal the Sessions Judge has confirmed the conviction, and the case now comes to this Court in revision.

The conviction cannot, of course, be justified unless the Nakedar was lawfully

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authorised to board the applicant's ship, demand payment of the octroi duty on goods which were being taken to Rajapur, and, on refusal, seize part of the goods in lieu of the tax. The principal question in this revision application is whether it has been clearly established that the Nakedar had this authority, so far as to justify the conviction of the applicant of an offence under S. 183. It is hardly necessary to say that as it is a criminal case the prosecution was bound to produce full and clear and satisfactory proof of the existence of the necessary authority. The Nakedar purported to act under R. 8 of the rules framed by the District Local Board under S. 100, Bombay Local Boards Act. This rule provides in Cl. (1) that whenever goods are brought to the Naka for import, the Nakedar shall prepare an import bill stating among other things the amount of the tax leviable on the goods, and Cl. (3) of the rule provides that if on demand the person importing the goods refuses to pay the amount leviable, the Nakedar shall seize any part of the goods of sufficient value to pay the amount of the octroi, and refer the matter to the President of the Taluka Local Board, who is to take action as laid down in S. 116 of the Act. I may mention that under the definitions prefixed to the Octroi rules, 'Octroi' means a tax on animals or goods or both brought within the octroi limits for consumption, use or trade therein; 'Import' and 'Export' mean respectively the conveying into or out of the octroi limits of the District Local Board from or to any other area; 'Naka' means a District Local Board station at which goods are being either imported or exported or both.

A very similar case came before Murphy, J. and myself in 1932, *Emperor* v. *Appa Krishnaji Tandel* (1). The facts in that case were that the Tandel of a country vessel had brought certain goods from Bombay for the village of Serjekot, which is within the port limits of Malwan in the Ratnagiri District. The Nakedar demanded payment of octroi duty on the goods destined for Serjekot. The Tandel refused to pay, and, as in this case, the Nakedar seized part of the goods, and the Tandel resisted him. We held in that case, in the first place, that it was established that the District Local Board has jurisdiction over the limits of the port of Malwan or any legal authority to levy a tax on goods which are on board a ship in the port and not landed. We held, in the second place, after a detailed examination of the octroi rules and bye-laws framed by the District Local Board, that even these rules and bye-laws do not make it clear that there is any liability to pay octroi before goods are landed. Lastly, we expressed a doubt as to the validity of the rule empowering the Nakedar to seize goods on refusal to pay the tax.

That last point, the importance of which the learned Sessions Judge, I think, has not fully grasped, arises in this way. There is a special chapter in the Bombay Local Boards Act, Ch. 8, which deals with the collection of taxes, and by S. 116 it is specifically provided that in the case of non-payment on demand of any toll leviable by a District Local Board, the person appointed to collect such toll may seize any vehicle or animal on which the toll is chargeable or any part of its burden which is of sufficient value to satisfy the demand. That is to say, specific power is given by the Act itself to recover the particular tax referred to by a species of distress. No such power is given by the Act in the case of any other tax, for instance, octroi. The relevant provisions in Ch. 7 which deal with taxation are, firstly, S. 99, which provides that subject to general or special orders of Government the District Local Board, after observing the preliminary procedure required by S. 100, and subject to the sanction of the Commissioner, may impose for the purposes of the Act any tax which a local authority may be authorized to impose by any local law without the previous sanction of the Governor-General. S. 100 deals with the procedure preliminary to the imposing of a tax, and prescribes that notice should be given and objections considered. It also provides for the framing of rules which are to describe the tax selected, the class or classes of persons or property liable and exemptions to the same, the amount or rate of the tax, and lastly, all other matters which the Government may require to be so specified. S. 102, proviso (b), authorizes and requires the publication of rules prescribing the mode of levying and recovering the tax. But

1. (1932) Crim. Rev. Appln. No. 314 of 1932, decided by Murphy and Broomfield, JJ. on 1st December 1932 (Unrep.).

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presumably any such rules must be consistent with the Act. *Non constat* that the Board has any power to make a rule such as R. 8 providing for the collection of the octroi in the same manner which is provided in the Act in the case of a toll by S. 116.

I myself delivered the judgment in *Appa Tandel's case* (1), and I may admit that, so far as the construction of the rules is concerned, some of the considerations on which we relied in that case impress me less than they did. One of the questions discussed in that case was as to the liability of the carrier of the goods or the master of the ship to pay octroi duty. That particular point appears to have been dealt with by a new bye-law which has been sanctioned since *Appa Tandel's case* (1) was decided, and the learned counsel who appears for the applicant has not in this case contended that if octroi was legally leviable on these goods his client would not have been bound to pay it. I am still of opinion, even after the further argument which we have had in this case, that the rules are very far from clear on the points which are in dispute, for instance, on the point whether goods which are brought on ship board to a port where there is a Naka can be said to be brought to the Naka so as to attract the operation of R. 8. But in any case, as we pointed out in the other case, it is obvious that the rules cannot confer powers which are beyond the powers given by the Act itself. The doubt which I previously felt as to whether the jurisdiction of the District Local Board extends to the limits of ports in the District or to ships in ports or creeks or goods thereon has not, by any means, been removed. Mr. Kane, who appeared on behalf of the District Local Board, contended that *Appa Tandel's case* (1) could be distinguished, because Malwan and Serjekot are on the open sea, whereas Jaitapur is at the mouth of a creek, and Rajapur is a port 18 miles inland. I am not satisfied however that this makes any difference in principle. The prosecution examined as a witness a District Surveyor in the Land Records Department, who has deposed as follows :

All the creeks in this district are measured. Half of the bed of a creek is shown as included in the area of a village on one side of it and the other half in the area of the opposite village. All the creeks in this district are included in the area of the Revenue district.

But all that appears to mean is that the bed of the creek is shown as included in the area of the Revenue district. This evidence, in my opinion, carries the matter no further. It cannot establish that the District Local Board has any authority to impose taxes on goods which are on board a ship in the creek or to make rules authorizing their servants to board ships and distrain goods on refusal to pay the tax. Moreover my doubts as to the validity of R. 8 have also not been removed. Mr. Kane's argument on this point was that all the rules, including the rules as to the collection of the octroi, have been sanctioned by the Commissioner and Government, and that therefore by virtue of S. 102 of the Act they must be regarded as having the force of law. S. 102 is in these terms :

All rules sanctioned under S. 101 with all the modifications subject to which the sanction is given, shall be published by the District Local Board . . . . . . and the tax as described in the rules so published shall . . . . be imposed accordingly.

The section does not say however that the rules, when sanctioned, are to have the force of law, and, in my opinion, it cannot have been the intention of the legislature to give legal effect in this way to rules not covered by the provisions of the Act. It should be noted that S. 62 of the Act specifically provides that bye-laws made by the District Local Board with the sanction of the Commissioner, after they have been duly confirmed by Government, shall have the force of law. There is no similar provision in the case of the rules. We are not satisfied therefore that the prosecution have succeeded in establishing that the Nakedar had lawful authority to board the applicant's ship and seize the goods he was carrying. It follows that the conviction for an offence under S. 183 cannot be sustained. Mr. O'Gorman made a further point in the course of his argument that the octroi rules are ultra vires, because they were sanctioned in the first instance for a period of three years only, and the period had subsequently been extended by Government from time to time. He relies on S. 102, proviso (c) of the Act, which is to the effect that if the levy of a tax has been sanctioned for a fixed period only, the levy shall cease at the conclusion of that period except in respect of unpaid arrears, and he contends that Government had no power to extend the period

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of the tax unless the District Local Board had first repeated the procedure prescribed by S. 100 preliminary to the imposing of a tax.

In my opinion there is no force in this argument. The Government is given wide and unrestricted powers by S. 99, according to which all taxation is to be imposed subject to any general or special orders which may be made by the Government. Under this section I consider that it was perfectly competent to Government or to the Commissioner in virtue of powers delegated to him both to limit the period of operation of the tax in the first instance and to extend the period. It was not a case of imposing a new tax, and S. 100 therefore would not apply. However, for the reasons already given the application succeeds on other grounds. We set aside the conviction of the applicant, and direct that the fine, if paid, be refunded.

Wassoodew, J.—I agree.

D.S./R.K. *Application allowed.*

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BROOMFIELD AND WASSOODEW, JJ.

Baburao Tatyarao—Accused 2—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 147 of 1936, Decided on 8th July 1936, from conviction of Sess. Judge, Broach and Panchmahals.

(a) Criminal P. C. (1898), Ss. 190 (1) (c) and 254—Taking cognizance under S. 190 (1) (c) — Meaning of — Cognizance under S. 190 (1) (c) is taken upon issue of process before evidence is recorded — Magistrate under S. 254 framing charge different from one indicated by complaint does not take cognizance under S. 190 (1) (c).

The expression 'taking cognizance of an offence' in S. 190 deals with a matter of a purely technical nature. Cognizance is usually taken upon complaint when process is issued, but no restricted interpretation can be given to that expression in the consideration of the character of the action of a Magistrate at any particular stage of the proceeding before him. But from the terms of S. 190 cognizance is taken upon issue of process before evidence is recorded. It is the complaint therefore which gives jurisdiction to the Magistrate. Consequently when under the provisions of S. 254 the Magistrate thinks upon the evidence heard that a charge different from the one indicated by the complaint should be framed, he does not take cognizance under S. 190 (1) (c), for the power to frame charge in a warrant case of the offence disclosed is inherent in the jurisdiction assumed by the Magistrate upon the original complaint: 1933 *Pat* 297, *Rel. on.* [P 380 C 2; P 381 C 1]

(b) Criminal P. C. (1898), S. 239—Criminal breach of trust by two persons in respect of same sum of money—Complaint suggesting community of design and objective — Such persons can be charged and tried jointly.

The Honorary Secretary and a clerk of a Co-operative Society who were responsible for the safety and custody of the cash of the society jointly misappropriated certain sum of money and the complaint suggested community of design and objective:

Held: that the persons could be charged and tried jointly under S. 239: 30 *Bom* 49, *Foll.*; 63 *Cal* 18, *Expl.* [P 382 C 1]

(c) Criminal P. C. (1898), S. 222 (2) — Charge not mentioning even approximately dates between which misappropriation was committed—But referring merely to date on which misappropriation was discovered — Charge is bad for vagueness.

The charge which does not unfold to the person accused of criminal breach of trust, even approximately, the dates between which he dishonestly converted to his own use the property in question and leaves that part of the prosecution case in obscurity by referring merely to the date on which the conversion was discovered must necessarily seriously prejudice the accused in his defence in the trial and is therefore bad for vagueness. [P 383 C 1]

(d) Criminal Trial—Joint trial — Jurisdiction—Complaint and evidence determine.

In joinder of charges and trial what gives jurisdiction to the Magistrate to proceed with a joint trial is the manner in which the case has been adumbrated in the complaint and put before the Court by the prosecution witnesses. [P 381 C 1]

G. C. O'Gorman and *H. D. Thakor*—for Accused.

B. G. Rao—for the Crown.

Wassoodew, J.—The applicant Baburao Tatyarao was convicted upon a joint trial with one Ambalal Nathalal Patel by the Resident Magistrate of Godhra for offences of criminal breach of trust and wilful destruction of accounts relating to Shantiniwas Housing Co-operative Society, under Ss. 408 and 477-A, I. P. C., respectively, and was sentenced to suffer eighteen months' rigorous imprisonment for each of the two offences with a fine of Rs. 200. The accused Baburao as well as Ambalal, who was also convicted along with him, appealed to the Sessions Judge. In that appeal Baburao was acquitted on the charge of destruction of accounts and convicted of criminal breach of trust. The learned Sessions Judge reduced the substantive sentence of imprisonment to four months and confirmed the fine.

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The applicant Baburao was employed at the material time as a clerk of the Shantiniwas Society and was working under the Honorary Secretary of that Society, Ambalal, who was the co-accused at the trial. As a clerk, it seems from the record, Baburao's principal duty was to write up the accounts, and, with the approval of the Honorary Secretary, recover and keep the money of the Society in his hands. Some time prior to this prosecution the account books of the Society were taken away by the applicant to his house on the pretext of writing a part thereof. Those books were subsequently reported to have been stolen from the house. Portions of them were destroyed and some pages were recovered in a mutilated condition during the investigation into that loss. The applicant therefore re-wrote some of them from the material available. In the beginning of March 1935, the accounts of the Society were subjected to audit by the Government auditor and the latter found on 22nd March 1935, that there ought to be a cash balance on hand of Rs. 3,481 or thereabouts. That cash balance was not available in the Society's office and the Honorary Secretary as well as the clerk were called upon to produce the same. The auditor remarked at the same time that as a rule in that Society the cash balance exceeded the minimum prescribed under the rules. The Honorary Secretary explained that the cash balance remained with the clerk, the present applicant, and he promised to see that it was produced in a couple of days. That was on 22nd March 1935. On 23rd March 1935 Rs. 1,851 were remitted into the bank by the applicant and the balance out of the cash in hand, viz. Rupees 1,629-12-2, was produced before the special auditor on 25th March 1935. On account of the fact that the cash balance was not available for checking on 22nd March 1935, and the fact that the accused required time to make good that sum, the auditor reported that it was a case of conjoint criminal breach of trust by the Honorary Secretary and the clerk whereupon both were prosecuted and convicted as stated above.

The questions of law urged before us were mainly whether the joinder of charges against two persons of criminal breach of trust in respect of a single sum of money does not offend against the provisions of Ss. 221 and 222, Criminal P. C., and secondly, whether the charge as formulated against the applicant is vague and therefore did not give him sufficient notice of the matter with which he was charged. Incidentally the learned counsel also argued that inasmuch as the original complaint disclosed an offence of criminal breach of trust only, the addition in the charge of an offence under S. 477-A was beyond the jurisdiction of the Magistrate, and that the latter having taken cognizance of that offence of his own accord committed an illegality in that he omitted to inform the accused that he was entitled to have the case tried by another Court under the provisions of S. 191, Criminal P. C.

I shall briefly deal with the last point first. It is clear upon the record that the initial proceedings were taken upon a complaint for the offence of criminal breach of trust punishable under S. 408, I. P. C. That complaint gave jurisdiction to the Magistrate under S. 190 (1) (a), Criminal P. C. It was essentially a warrant case and was tried as such by the Magistrate. The procedure in regard to such trials is governed by the provisions of Ch. 21 of the Code. According to the provisions of S. 254, when the prosecution evidence has been taken and the accused examined and the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under that chapter, which such Magistrate is competent to try, he has to frame a charge in writing against the accused. It seems from the notes of the Magistrate that when objection to the framing of the charge under S. 477-A was taken before him, he defended his action by relying on the provisions of Cl. (c) of sub-s. (1), S. 190, Criminal P. C. The expression "taking cognizance of an offence" in S. 190 of the Code deals with a matter of a purely technical nature. Cognizance is usually taken upon complaint when process is issued, but no restricted interpretation can be given to that expression in the consideration of the character of the action of a Magistrate at any particular stage of the proceeding before him : see 53 Cal 350 (1). But from the terms of S. 190 it is clear that cognizance is taken

1. Emperor v. Mackey, 1926 Cal 470 = 93 I C 33=53 Cal 350=27 Cr L J 385=30 C W N 276 (F B).

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upon issue of process before evidence is recorded. It is the complaint therefore which gives jurisdiction to the Magistrate to try the offence. Consequently when under the provisions of S. 254 the Magistrate thinks, upon the evidence heard, that a charge different from the one indicated by the complaint should be framed, he does not take cognizance under S. 190 (1) (c); for the power to frame a charge in a warrant case of the offence disclosed is inherent in the jurisdiction assumed by the Magistrate upon the original complaint. The point is really covered by authority and has been discussed by Dhavle, J. in 12 Pat 758 (2). It seems to me that the objection to the procedure of the Magistrate cannot therefore be upheld.

Turning then to the question of misjoinder of charges and trial, it is essential to remember that what gives jurisdiction to the Magistrate to proceed with a joint trial is the manner in which the case has been adumbrated in the complaint and put before the Court by the prosecution witnesses. Here was a case of an Honorary Secretary of a Co-operative Society who was primarily responsible for the custody and safety of the cash of the society. He had allowed his clerk to be in possession of the money. The prosecution alleged that they had jointly misappropriated the Society's money inasmuch as it was not forthcoming when the auditor inspected the accounts and found that the sum in question ought to have been in the hands of the Honorary Secretary. If the underlying suggestion in the complaint was community of design and objective, it seems to me fairly obvious that in respect of the action of the persons who were admittedly in charge of the funds (I say "admittedly" advisedly because I notice from para. 2 of the applicant's statement in his petition that the applicant and Ambalal were in charge of the funds and accounts of the Society) the procedure of the learned Magistrate in treating the alleged acts as forming parts of the same transaction within the meaning of S. 239, Criminal P. C., was prima facie justified. In 30 Bom 49 (3) it was held that where the accused persons were jointly in charge of trust funds, so that one could not act without the connivance of the other, and each of them misappropriated sums of money from the trust funds to his own use and were acting in concert, S. 239, Criminal P. C., admitted of their joint trial. According to the observations of Batty, J., it is the tenor of the accusation and not the wording of the charge that must be considered as the test for determining the question of joinder of charges and trial. We were referred in the course of argument to the cases in 16 C W N 600 (4) and 8 Rang 632 (5), as authorities for the proposition that there can be no joint charge of one offence against two or more persons for criminal misappropriation in respect of the same or part of the same sum of money. In the former case the head-note is:

> Where in a case more than one person were jointly charged with the offence of criminal breach of trust under S. 408, I. P. C., with respect to a sum of money:
>
> *Held*: that there was a misjoinder of charges in the case. The wording of S. 222, Criminal P. C., refers to a single accused; and it must be so because it is impossible to hold that two persons can be guilty of misappropriation of the same parcel of the money. S. 239 therefore has no application to such a case.

It was observed in the judgment that (p. 602):

> One may be guilty of misappropriating a portion of it or one may be guilty of abetting the other. The misappropriation of the actual money must be the act of a single person, and therefore S. 239 has no application, because more than one person could not be charged with this particular offence of misappropriation of a single sum.

With extreme respect it is difficult to reconcile that proposition in the abstract to concerted and conjoint defalcations by two or more persons. It is perfectly conceivable, as the learned counsel for the applicant admitted, that two or more persons might utilise the sum misappropriated for the benefit of their joint account. The question has to be decided by reference to the particular facts of each case. Otter, J. in 8 Rang 632 (5) has followed the Calcutta ruling in the case before him. In that case one accused was charged with having misappropriated certain sums of money, and another accused with having misappropriated part only of

2. Baladeo Prasad v. Emperor, 1933 Pat 297 = 1933 Cr C 789 = 145 I C 382 = 34 Cr L J 942=12 Pat 758.
3. Emperor v. Datto Hanmant, (1906) 30 Bom 49=7 Bom L R 633=2 Cr L J 578.
4. Girwar Narain v. Emperor, (1912) 15 I C 650=13 Cr L J 506=16 C W N 600.
5. K. Meeriah v. Emperor, 1931 Rang 90=1931 Cr C 378 = 132 I C 548 = 32 Cr L J 930 = 8 Rang 632.

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the same moneys. In holding that each act of misappropriation of the two accused was complete in itself and the charge of abetment against the third accused was illegal and contrary to S. 222 (2) of the Code, Otter, J. took occasion to guard himself against expressing the opinion that in no case could more than one person be guilty of misappropriating the same sum of money or that S. 222 of the Code could never apply to persons jointly charged. The case in 63 Cal 18 (6) which was referred to at the Bar does not go so far as to say that in no event should two persons be jointly charged in respect of criminal breach of trust in respect of a single sum of money. The Judges were dealing with the manner in which in that case the charge was framed which did not state who made the alleged entrustment and who suffered from the alleged breach of trust. Therefore they held that the charge of embezzlement was indefinite and embarrassing. If authority were needed for the proposition that upon an averment of community of dishonest purpose and action a joinder of charges was justifiable, I would follow the ruling in 30 Bom 49 (3) which is binding on us.

But the objection in regard to the form in which the charge has been formulated goes to the root of the trial. It was stated in the charge that the criminal misappropriation took place on or about 22nd March 1935, the date on which the absence of the balance in hand was discovered. S. 222, Criminal P. C., makes a departure in some respects from the ordinary rules relating to the framing of charges and does away with the necessity of amplification of certain statements of detail which other sections of the Code require to be specified. But it does require the specification of such particulars as to the time and place of the offence as are reasonably sufficient to give the accused notice of the matter with which he is charged. That is so stated in Cl. 1 of S. 222. Cl. 2 of that section provides that:

When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of S 234:

Provided that the time included between the first and last of such dates shall not exceed one year.

In dealing with the charge framed in the present case there is no doubt that in regard to the first requirement under Cl. (2) it is in order. The gross sum, viz. Rs. 3,481, in respect of which the offence is alleged to have been committed, is specified. The second requirement of that clause as well as that of Cl. 1 is that the date of the offence or the dates between which the offence is alleged to have been committed have to be specified. The law dispenses with specification of particular items or exact dates; and approximate references are enough. In that respect the charge seems to be extremely defective. The only date specified is 22nd March 1935, as the date on which the criminal breach of trust is alleged to have been committed. If it was the prosecution case that on 22nd March 1935 the accused had criminally misappropriated the amount in question, then unquestionably the charge was perfectly in order. The evidence of the prosecution however disclosed that the auditor discovered on 22nd March 1935 that the balance in hand should have been Rs. 3,481 and that that sum was not available. The utmost that can be said upon the statement in the complaint and the evidence is that it was the date on which the alleged defalcation was discovered. Upon the prosecution evidence, on 22nd March 1935, the accused had not in his possession the amount in question. In the circumstances it is reasonable to suppose that the misappropriation had taken place antecedent to that date. As to when the sums of money that were made good between the Honorary Secretary and his clerk were actually misappropriated the learned Assistant Government Pleader was unable to enlighten us from the record. All that he could say was that according to the statements supplied by the auditor there were varying balances, minimum as well as maximum, in the hands of the clerk and the Honorary Secretary between February 1934 and March 1935. That serves the only purpose of proving that the Society's cash balances to that extent were in the hands of the persons entrusted with the management of the Society's funds on those dates; but the statements could not prove on what particular dates

6. Abinashchandra Sarkar v. Emperor, (1936) 63 Cal 18=161 I C 280=37 Cr L J 439.

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or months the items which should have been in hand were found wanting or misappropriated.

In the above state of the record and in the absence of further proof as to dates on which the misappropriations took place, the question arises whether the statement as to the date referred to in the charge framed by the learned Magistrate is reasonably sufficient to give the accused notice of the matter with which he was charged. It is pointed out for the Crown that there is an extra-judicial confession on the record made before the auditor by the applicant who admitted having used the balance in his hand for his own private purpose and that is sufficient to cure the defect. Apart from the value to be attached to that statement, it is clear to me that the charge which merely implies that the date of the discovery of the fraud might perhaps be the date of commitment of defalcation must be regarded as extremely defective. The prosecution obviously could not give any indication as to the approximate date of the commitment of the alleged defalcations in the circumstances of this case. The defalcation, as I have already stated, was committed, according to the record, some time prior to the date given in the charge. The charge which does not unfold to the person accused of criminal breach of trust, even approximately, the dates between which he dishonestly converted to his own use the property in question, and leaves that part of the prosecution case in obscurity by referring merely to the date on which the conversion was discovered, must necessarily seriously prejudice the accused in his defence in the trial and is, therefore, bad in law. In that sense the charge is bad for vagueness. I would, therefore, set aside the applicant's conviction, and in view of all the circumstances order his acquittal. The fine paid shall be refunded and the bail bond cancelled. The rule issued by this Court to the applicant to show cause why the sentence should not be enhanced if the application for revision be dismissed is accordingly discharged.

Broomfield, J.— The charge against the two accused persons in this case was that :

On or about 22nd March 1935, being entrusted with the funds of the Society amounting to Rs. 3,481 you committed criminal breach of trust with respect to the said amount.

There was also a charge under S. 477-A, and before the Sessions Judge there was an elaborate argument as to the power of the Court to add this charge which was not in the original complaint. On that point I have nothing to add to the observations of my learned brother.

Dealing with the charge under S. 408, criminal breach of trust, it has been argued that two persons cannot misappropriate the same sum of money, and that there is a misjoinder of charges, also that the charge is too vague and does not set out all the ingredients of the offence under S. 408. Reliance has been placed for the first contention on 16 C W N 600 (4) and 8 Rang 632 (5) and for the second on 63 Cal 18 (6). I doubt if there is any substance in either point. The cases cited were decided on their own facts and in my opinion were not intended to lay down any invariable rule. As my learned brother has pointed out, Otter, J. at p. 642 of the case in 8 Rang 632 (5), expressly guarded himself against being supposed to lay down the proposition that two or more persons can never be charged with misappropriation of the same sum of money. Obviously two persons cannot misappropriate the same some of money independently, but there is no reason why they should not co-operate in doing it. S. 34, Penal Code, would enable two or more persons to be charged jointly with the misappropriation of the same sum, and it has been held that it is not necessary to incorporate S. 34 in the charge : 49 Bom 84 (7).

It may also be pointed out that the definition of "criminal breach of trust" itself includes the words "or wilfully suffers any other person so to do." If this case had been sent up for trial in Bombay City, the accused would probably have been charged with breach of trust and for aiding or abetting one another in the commission thereof. Perhaps that might have been technically more correct. But it cannot reasonably be contended, in my opinion, that the accused have been prejudiced, and in the absence of prejudice, the defect in the charge, if there is any, would be curable under S. 537, Criminal P. C. As I have several times had occasion to point out

7. Emperor v. Ranchhod Sursang, 1924 Bom 502=87 I C 600=26 Cr L J 1000=49 Bom 84=26 Bom L R 954.

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recently, in view of 54 I A 96 (8) and 53 Mad 937 (9), 25 Mad 61 (10) can no longer be regarded as an authority for the proposition that any misjoinder of charges necessarily vitiates the trial, irrespective of the question whether the accused has been damnified thereby.

As for the alleged vagueness of the charge, it is provided in Cl. (2), S. 221 of the Code, that if the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only, and the charge as framed in this case is in accordance with the form given in all text-books. All the prosecution were in a position to state was that the accused, according to their own books, ought to have had Rs. 3,481 in their possession and they were unable to produce it on demand. The prosecution had no means of knowing the particular manner in which the money had been misappropriated, but that in itself cannot make the charge of breach of trust unsustainable. Cl. (5) of the same S. 221 says :

> The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

The realy serious difficulty about this charge, curiously enough, is not that it is too vague, but that it is too definite, in this respect, that it alleges breach of trust on or about 22nd March, when as a matter of fact the prosecution was not in a position to prove misappropriation on or about that date. In fact it is contrary to all the probabilities of the case that there should have been any misappropriation at or about that time. Early in March the auditor had intimated his intention of auditing the accounts of another institution in Godhra, and the accused would naturally expect that the accounts of their Society would also be inspected. That was obviously not the time when anybody would be likely to make away with the money. The second accused repaid the missing amount in the course of a day or two, but in order to do that he had to borrow the money. The misappropriation had no doubt taken place already, and that was the reason why the accused were unable to produce the money on demand. The learned Sessions Judge in para. 15 of his judgment referring to the re-constructed books of the Society, says that the sum of Rs. 3,481 must be the balance between 1st and 23rd March. But these figures merely show what money ought to have been available, not what was in fact in the possession of the accused on those dates. The misappropriation may have taken place, and probably did take place, long before, and may have been spread over a considerable period. The failure to produce the money on demand would not in itself come within the definition of misappropriation or breach of trust. The evidence does not show clearly when the accounts had last been audited. But it does show that there were periodical audits at which the balances were checked. It would have been quite possible, therefore, for the prosecution to ascertain the last occasion on which the moneys were known to have been in the hands of the accused, and to have framed a charge accordingly, fulfilling the requirements of S. 222 of the Code.

The learned advocate who appears for the Crown in this Court has relied upon the fact that accused No. 2 admitted before the auditor that he had used the money, and he argued that in view of that admission it was not necessary for the prosecution to allege or prove when the misappropriation took place. If there were any force in this argument it would apparently mean that the date might have been left out of the charge altogether. But that, I think, is clearly not so. My learned brother has read the provisions of S. 222. You must allege either misappropriation at a particular time or misappropriation within a particular period. In the present case the charge alleged misappropriation on or about the particular date, 22nd March. If you allege a particular date you must prove that the offence took place at or about that time.

The position here is not that the charge is seriously defective as it stands, but that the prosecution have failed to establish the allegation made in the charge. If, with the charge as it stands, the prosecution had attempted to prove misappropriation of the money at a different date or within a particular period, then the

8. Abdul Rahman v. Emperor, 1927 P C 44=100 I C 227=54 I A 96=28 Cr L J 259=5 Rang 53 (P C).
9. Ramaraju Tevan, In re, 1930 Mad 857=1930 Cr C 1033=127 I C 654=53 Mad 937=32 Cr L J 30=59 M L J 945.
10. Subrahmania Ayyar v. Emperor, (1902) 25 Mad 61=28 I A 257=8 Sar 160 (P C).

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question would arise whether the charge was defective and whether the accused had sufficient notice of the charge sought to be made against him. But what happened here was that the prosecution produced no evidence either of misappropriation on 22nd March or of misappropriation at any other time, and it has to be conceded that there is nothing on the record which goes to show that any misappropriation took place on or about 22nd March which was the date given in the charge. There being no proof of the charge against him, the accused must obviously be acquitted. This result is not as unsatisfactory as it might otherwise have been in view of the fact that he has restored the whole of the money. I agree with the orders proposed by my learned brother.

D.S./R.K. *Conviction set aside.*

*** A. I. R. 1936 Bombay 385**

BEAUMONT, C. J. AND RANGNEKAR, J.

Commissioner of Income-tax, Bombay—Applicant.

v.

Gopal Vaijnath Manohar—Opponent.

Civil Appln. No. 1161 of 1935, Decided on 11th March 1936, from order of High Court original side in Civil Ref. No. 2 of 1935.

*** Income-tax Act (1922), S. 66 (2) — Fees deposited by assessee for reference — Fees form part of assessee's costs of reference — Order directing commissioner to pay costs covers return of fee.**

The fees paid by the assessee as required by S. 66 (2) form part of the assessee's costs of reference and on reference being allowed in assessee's favour, an order directing the commissioner to pay the costs covers the return of fee to the assessee : 1934 *Rang* 4, *Ref.* [P 386 C 1]

K. McI. Kemp and *A. P. Lillie* — for Applicant.

K. S. Shavaksha, *Ranchhoddas* and *Hakim*—for Opponent.

Beaumont, C. J. — This application raises a short point of practice in connexion with references under S. 66, Income-tax Act. That section provides under sub-s. (2) that in certain circumstances the assessee may by application, accompanied by a fee of Rs. 100 or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law. Then there is a proviso to the section, which specifies the cases in which the Rs. 100 fee can be recovered. The proviso directs that if the Commissioner rejects the application on the ground that it is time-barred or otherwise incompetent, or if in exercise of his powers under sub-s. (3), the Commissioner refuses to state a case, or if the Commissioner decides the case under S. 33 in revision, the assessee may, within 30 days from the date on which he receives notice of the order passed by the Commissioner, withdraw his application, and if he does so, the fee of Rs. 100 shall be refunded. Those are the only cases in which the fee is directed to be refunded. Then sub-s. (6) provides that where a reference is made to the High Court on the application of an assessee, costs are to be in the discretion of the Court.

Now in this case a reference was made to the Court, and the Court made an order that the Commissioner should pay the costs on the original side scale, that being the usual order made in cases in which the assessee is successful. The assessee has included in his bill of costs the fee of Rs. 100 paid under S. 66 (2), and the Taxing Master has allowed it, and the question on this application is whether the Taxing Master was right in so doing. Dealing with the matter in the first instance under the Act and apart from authority, the position is that this fee is to be paid as a preliminary to starting the proceedings for a reference. The Commissioner cannot be put in motion to refer a point of law to the High Court until the fee has been paid, though no doubt the fee is paid before the reference is actually made. The fact that the section, whilst providing for the return of the fee in the event of the reference not being effective, makes no provision for the return of the fee if the reference is effective and the decision of the Court goes against the Commissioner, seems to suggest that the legislature intended that where the reference comes before the Court the question of return of the fee should be in the discretion of the Court as part of the costs of the reference, and as the payment of the fee is a necessary incident to the obtaining of a reference, it seems to me that under the Act it is legitimate to hold that this fee is part of the assessee's costs of the reference.

We are told that it has not been the practice up to now to allow the fee, but, on the other hand, it is the

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practice to allow the fee in other High Courts. We have been referred particularly to a recent decision of the Rangoon High Court: 11 Rang 454 (1), where the learned Chief Justice, although he rather indicates the view that if the matter had been free from authority he would have been disposed to hold that this fee was not part of the costs of the reference, nevertheless followed the practice of the High Courts of Madras, Allahabad, Patna and Lahore, and directed the fee to be treated as part of the assessee's costs. The Advocate-General says that in some of the decisions of the other High Courts the fee has not been treated as part of the costs, but the Court has made an order that it be refunded. In my view the Court has no jurisdiction to order the fee as such to be refunded; it can only deal with the matter in relation to costs. In my opinion, the fee is part of the assessee's costs of the reference, and consequently our order directing the Commissioner to pay the costs covers the return of the fee as being part of the out-of-pockets of the assessee. In cases in which the assessee is ordered to pay costs, the Court can, if it considers that credit should be given to the assessee for the fee, give the Commissioner his costs less Rs. 100. Application dismissed with costs on the original side scale.

Rangnekar, J.—I agree.

A.L./R.K. *Application dismissed.*

1. Commissioner of Income-tax, Burma, v. J. I. Milne, 1934 Rang 4=148 I C 98=11 Rang 454 (S B).

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BEAUMONT, C. J. AND DIVATIA, J.

Mallappa Gurupadapa Belvaldavar—Plaintiff—Appellant.

v.

Anant Balkrishna Narayanpeit and *another*—Defendants—Respondents.

First Appeal No. 31 of 1930, Decided on 30th March 1936, from decision of First Class Sub-Judge, Dharwar, in Special Civil Suit No. 7 of 1929.

(a) Hindu Law—Alienation—Sale by mother acting as guardian of minor—Son suing for possession on attaining majority—Legal necessity not proved by purchaser—Sale invalid.

The property belonging to a minor was sold by his mother acting as a guardian of the minor. The son, on attaining majority, brought a suit to set aside the sale as invalid and for possession of the property sold. The purchaser was not able to prove the existence of the alleged necessity on the date of sale or that he took necessary steps to ascertain whether or not there was any case of legal necessity:

Held: that the sale was invalid. [P 387 C 1]

*** (b) Hindu Law — Alienation — Sale by guardian set aside—Suit for possession only —Mesne profits can be awarded only from date of suit and not from date of sale.**

Where plaintiff sues to set aside the original transaction, whether it be a sale by a Hindu widow or manager of joint family or guardian of minor and he makes the original parties to transaction, or their representatives, parties, he is entitled to an order restoring the parties to their original position. In such a case the Court is in a position to make such order as is just and equitable and to provide that the plaintiff recovers the land with mesne profits from the date from which he was dispossessed and the defendant purchaser gets back his purchase money with interest. [P 388 C 1, 2]

But if the plaintiff merely desires to recover possession of the land and not to set aside the sale as from its date and to restore parties to their original position then he is entitled to recovery of possession with mesne profits only from date of suit: *Case law reviewed.* [P 388 C 2]

G. R. Madbhavi and *V. V. Bhadkamkar*—for Appellant.

Beaumont, C. J.—This is an appeal from a decision of the First Class Subordinate Judge of Dharwar. The plaintiff sued to recover possession of the suit property on the ground that it had been sold to the defendants by the plaintiff's guardian, and that the sale was not for legal necessity and was invalid against the plaintiff. The learned Judge made an order that the plaintiff do recover possession of the suit lands from defendants 1 and 2 together with Rs. 1,950 as past mesne profits from the date of the sale. The respondents have not appeared in this appeal.

The sale deed alleges necessity in that the money was required for the education of the son of the vendor, who was the mother of the plaintiff, and for the marriage of her daughter. The learned Judge held that these grounds of necessity were not proved. The learned Judge refers to a good many discrepancies in the evidence, to which I attach considerably less importance than he did. The sale took place in 1915, and the witnesses were giving evidence 15 years later, and it is not to be wondered at that their recollections of what took place did not altogether agree. The learned Judge came to the conclusion that the purchase money, which was Rs. 1,000, was not paid, but I am not prepared to accept

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that view. There were two independent witnesses, Yellappa and Shankargouda, who stated that the money was paid in their presence. I see no reason to reject that evidence. It was not the plaintiff's case that the money was not paid. The plaintiff's case was that the money was paid to his mother at the instance of his brother, and that the object of the sale was to raise money to defend two other brothers of hers on a charge brought against them for dacoity. But I think the learned Judge's view is correct that it is not proved that necessity for the sale did exist, and that the defendants did not make sufficient inquiries and satisfy themselves as to the existence of the alleged necessity. Defendant 1, who was the actual purchaser and the elder brother of defendant 2, has died. So we have not got his version of what took place. But all the witnesses for the defendants admit that, as far as they know, no attempt was made to ascertain whether in fact a daughter of the vendor was about to be married, or whether her son required moneys to be spent for his education. The son, viz., the present plaintiff, was only two or three years old at the time, and on the evidence, money was not required at the moment for his education or for the marriage of a daughter. I think therefore that there is no ground on which we can disturb the learned Judge's finding that in fact legal necessity did not exist, and the purchaser did not take the necessary steps to ascertain whether or not there was any case of legal necessity. That being so, we cannot disturb the Judge's order that the plaintiff is entitled to recover possession.

But a serious question arises as to the propriety of the learned Judge's order for payment of mesne profits as from the date of the sale in 1915. The net result of his order is that the unfortunate purchaser loses his purchase money as from 1915, loses the land for which he paid, and loses all the profits made out of the land since 1915, largely no doubt by his own exertions, although all that can be said against him is that after 15 years he was unable to prove that he exercised due diligence in ascertaining the facts. He is placed in a far worse position than he would have been in, if the conveyance had been set aside on the ground of his fraud, when the parties would have been restored to their original position. It seems to me that the learned Judge's order cannot be justified on principles of equity, and the question is whether in law it is right. There are two conflicting decisions of this Court on the point, both unreported. In *Sahebgouda Sonappa* v. *Parawa* (1), a Bench of this Court followed two Madras cases, 45 Mad 449 (2) and 46 Mad 815 (3), in deciding that past mesne profits were not recoverable. Those were cases in which the reversioner was suing to recover possession on the ground that a sale made by a Hindu widow was not for legal necessity or for the benefit of the estate, and the Court held that the purchaser could not recover mesne profits before the date of the suit, since the conveyance was voidable and not void. No doubt, in the case of a sale by a widow no mesne profits could be recovered in any event before the date of the widow's death, because the sale would be binding upon her, and she would be herself entitled to the profits down to that date. But as from the date of her death mesne profits could be awarded if the conveyance was void ab initio against the reversioner. In a subsequent case before another Bench of this Court, *Appanna Kenchappa* v. *Vithal Ramachandra* (4), in which the plaintiff was suing to set aside a sale made by his guardian, the Court refused to follow the previous decision of this Court or the cases in Madras, holding that in those cases certain decisions of the Privy Council had been overlooked, and suggesting that there might be a distinction in principle between a sale by a guardian and a sale by a Hindu widow. The cases in the Privy Council which were relied on were 34 I A 87 (5), 10 Bom L R 230 (6) and 59 I A 147 (7). In my

1. F. A. No. 73 of 1932, decided by Beaumont, C. J. and Sen, J., on 31st August 1934 (Unrep.).
2. Subba Goundan v. Krishnamachari, 1922 Mad 112=68 I C 869=45 Mad 449=42 M L J 372.
3. Ramasami Aiyar v. Venkatarama Ayyar, 1924 Mad 81=75 I C 406=46 Mad 815=45 M L J 203.
4. F. A. No. 20 of 1930, decided by Broomfield and Tyabji, JJ., on 10th February 1936 (Unrep.).
5. Bijoy Gopal Mukerji v. Krishna Mahishi Debi, (1907) 34 Cal 329=34 I A 87 (P C).
6. Raja Rai Bhagwat v. Debi Dayal Sahu, (1908) 35 Cal 420=35 I A 48=10 Bom L R 230 (P C).
7. Satgur Prasad v. Har Narain Das, 1932 P C 89=136 I C 108=59 I A 147=7 Luck 64 (P C).

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opinion, the first and the last of those cases have really no bearing on the matter before us. The case in 34 I A 87 (5) was a case in which the Privy Council had to consider whether a suit by a reversioner to set aside an ijara, or lease, made by a Hindu widow was a suit to recover possession of property which fell under Art. 141, Lim. Act, or was a suit to cancel or set aside an instrument not otherwise provided for and fell under Art. 91. The Board recognized that the alienation by the widow was voidable and not void, but they held that it was sufficient for the plaintiff to sue to recover possession, and that by so doing he elected to treat the transaction as void, and that it was not necessary for him to sue in express terms to have the conveyance set aside. The Court was not dealing with mesne profits, and the case is no authority for the proposition that in such a case the conveyance is void ab initio, as this Court seems to have supposed. The case in 59 I A 147 (7) was a case to set aside a transaction induced by fraud, and the Court held that the plaintiff was entitled to mesne profits either under S. 86, Trusts Act of 1882, or on the equitable principle of *restitutio in integrum*. That case again has no bearing on the question before us in which there is no suggestion of restoring the parties to their original position. The other case in 10 Bom L R 230 (6) was no doubt a case of a sale by a widow; it was held that it was in part for legal necessity and in part not for legal necessity, and the Privy Council held that the plaintiff was entitled to mesne profits, the specific amount to be ascertained in execution, but as against that the purchaser was entitled to interest at six per cent on so much of the purchase money as had been devoted to legal necessity. So that case was, in part at any rate, a case of *restitutio in integrum*. Compare also the decision of the Privy Council in 45 I A 284 (8).

There being conflicting decisions of different benches of this Court on a question of principle, it is open to us to decide which case we ought to follow. In my opinion the true view is that where the plaintiff sues to set aside the original transaction, whether it be a sale by a Hindu widow, or manager of a joint family, or guardian of a minor, and he makes the original parties to the transaction, or their representatives, parties, he is entitled to an order restoring the parties to their original position. In such a case the Court is in a position to make such an order as is just and equitable, and to provide that the plaintiff recovers the land with mesne profits from the date from which he was dispossessed, and the defendant-purchaser gets back his purchase money with interest, and in a proper case other moneys to which he may be entitled. That is the form of order made when a sale is set aside as induced by fraud: see Seton on Decrees, Edn. 7, Vol. 3, p. 2250. But if the attitude which the plaintiff adopts is that he merely desires to recover possession of the land, and that the payment of the purchase money to a party who was not entitled to receive it, is no concern of his, then he is entitled, in my opinion, merely to an order for recovery of possession with mesne profits from the date of suit. He cannot in such a case treat the purchaser, who was in, under a voidable conveyance, as a mere trespasser before the date at which the plaintiff elects to treat the conveyance as void as against him. In the present case, the plaintiff did not sue to set aside the conveyance as from its date, and to restore the parties to their original position. He merely sought an order for recovery of possession, and, in my opinion, it follows that he is only entitled to mesne profits as from the date of the suit. The decree of the lower Court will, therefore, be varied by striking out the order that the defendants do pay Rs. 1,950 as past mesne profits. The order will be that the plaintiff do recover possession of the land with mesne profits from the date of the suit. The amount to be ascertained in execution. The plaintiff will be entitled to his costs of the suit. With regard to the costs of the appeal, as the appeal has succeeded in part and failed in part, there will be no order as to costs.

Divatia, J.—I agree. The decision of the lower Court on the point of legal necessity appears to me to be correct because the defendant-appellant, on whom the burden lies to prove legal necessity or enquiry, has not succeeded in proving the same. At the same time the lower Court does not seem to be correct in holding that the whole of the considera-

8. Banwari Lal v. Mahesh, 1918 P C 118=49 I C 540=45 I A 284=41 All 63=21 O C 228 (P C).

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tion was not paid. The depositions of Venubai and Mallappa would show that the consideration must have been paid, and looking to the fact that the suit has been brought nearly fourteen years after the date of the transaction, some of the discrepancies in the evidence are due to this distance of time. Therefore, it appears that although the transaction may not be supported on legal necessity, the consideration had actually passed.

With regard to mesne profits, I agree that on the facts of the present case, the plaintiff is not entitled to mesne profits before the date of the suit. As has been observed by the Privy Council in 27 I A 110 (9), mesne profits are in the nature of damages which the Court may award according to the justice of the case. It seems to me that the defendant-appellant has not been able to prove legal necessity or enquiry because of the delay of fourteen years that has taken place after the transaction was entered into, and the plaintiff has come to the Court to demand possession of the property without offering to repay the consideration which he is stated to have received. That being so, there is scope for the application of the equitable principle that he would not be entitled to mesne profits before the date of the suit. Such equitable principle has been applied by the Courts. In 39 All 61 (10) it has been held that where the father, as manager, alienates joint family property without legal necessity, and the sons repudiate the sale, a purchaser who had no notice that the father was incompetent to sell the property, is in equity only liable to pay mesne profits from the date of such repudiation, and the Privy Council has also in 45 I A 284 (8) made an order for the recovery of mesne profits from the date of the suit, where there was a conditional decree passed in the plaintiff's favour. I think, therefore, that it is open to Courts to apply this equitable principle according to the facts of each case, and on the facts of this case, I think the plaintiff should get mesne profits not from the date of the transaction but from the date of the suit.

A.L./R.K. *Decree varied.*

9. Girish Chunder Lahiri v. Shoshi Shikhareswar, (1900) 27 Cal 951=27 I A 110 (P C).
10. Bhirgee Nath Chaube v. Narsing Tiwari, 1917 All 479=35 I C 475=39 All 61=14 A L J 1161.

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BROOMFIELD AND TYABJI, JJ.

Balaji Vasudeo Athawale—Appellant.

v.

Sadashiv Kashinath Lavate and *another*—Respondents.

First Appeal No. 121 of 1930, Decided on 4th March 1936, from decision of First Class Sub-Judge, Nasik, in Suit No. 430 of 1928.

(a) Guardians and Wards Act (1890), Ss. 29 and 30 — Alienation by guardian appointed under Guardians and Wards Act with sanction of District Court — Alienation is binding on minor unless alienee has been party to fraud or collusion — Alienee is not bound to inquire into expediency or necessity of alienation.

Where an alienation by way of mortgage or sale has been made by the guardian of a minor, appointed under the Guardians and Wards Act, with the sanction of the District Court, the alienee can rely upon it and is not bound to inquire as to the expediency or necessity of the alienation for the benefit of the minor's estate, and the alienation is binding upon the minor unless the alienee has been a party to a fraud or collusion or has been guilty of any underhand dealing: 11 *Cal* 379 (*P C*); 1927 *Mad* 233 and 1928 *Pat* 543, *Rel. on*; 1932 *Bom* 537, *Disting.* [P 392 C 2]

(b) Guardians and Wards Act (1890), S. 31 — District Judge's order omitting to recite necessity for alienation or advantage to be derived from it — Omission is only irregularity and cannot invalidate order.

Where alienation by way of mortgage or sale is made by the guardian of the minor appointed under Guardians and Wards Act with the sanction of the District Judge, but the District Judge's order omits to recite the necessity for alienation or advantage to be derived from it, the omission though not strictly complying with the provisions of S. 31, is only an irregularity and cannot invalidate the order: 1927 *Mad* 233 and 1928 *Pat* 543, *Rel. on.* [P 393 C 2]

G. N. Thakor and *C. H. Patwardhan*—for Appellant.

H. C. Coyajee and *D. R. Patwardhan*—for Respondent 2.

Broomfield, J.—The suit from which this appeal arises was brought by the appellant to avoid a sale of a house at Nasik which was effected by his guardians with the sanction of the District Court given under the Guardians and Wards Act on 8th March 1922. The plaintiff was left considerable property by the will of his granduncle Ganesh Jagannath. The will, which was made in 1911 when the plaintiff was seven years old, appointed his mother Radhabai and the testator's daughter Kondubai trustees to manage the estate during their life-

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time. It provided that the trustees were to provide for the maintenance of the plaintiff and themselves and other relations of the testator. For the purpose of maintenance a provision of Rs. 500 a year was specified and authority was given for spending other sums on the plaintiff's thread ceremony and marriage and on pilgrimages by Kondubai and other purposes. The estate consisted for the most part of shares in the Tata Iron Company and other concerns and of amounts deposited in the Indian Specie Bank. There were three parcels of land amounting in area to about seven acres together, of the value of Rs. 1,350 out of the total amount of Rs. 30,571-2-8 at which the estate was valued in the will.

The house in suit was purchased by the plaintiff's mother on 28th August 1914. It appears that about this time the shares in the Tata Company were sold for Rs. 8,000 and the suit house at Nasik and also some lands at Makhamalabad, Khanur and Bhadane were purchased out of the sale proceeds. The purchase price of the suit house was Rs. 6,000. Out of this amount Rs. 2,000 had to be borrowed and the house was mortgaged to secure that debt. Soon after the purchase, the trustees proceeded to enlarge the building and erected a three storeyed building on a portion of the land. A house was also erected on some open land which had been purchased at Nasik. In October 1916 the suit house was mortgaged by the plaintiff's mother Radhabai purporting to act for the plaintiff and for herself to defendant 1. The consideration for the mortgage was stated to be Rs. 7,000, which was made up of the following items: Rs. 700 on account of a promissory note executed nine days before the mortgage; a hundred rupees paid in cash; Rs. 3,700 cash paid before the Sub-Registrar, and the balance of Rs. 2,500 was to be advanced by the mortgagee for the purpose of the new building which was being constructed from time to time as required.

In August 1920, Kondubai, who was then the sole surviving trustee, Radhabai having died in May 1918, applied to the District Court to be appointed guardian of the person and property of the plaintiff. It was mentioned in the application that the reason for approaching the Court was that a necessity had arisen for selling part of the estate. Kondubai and the Deputy Nazir were appointed joint guardians in November 1920. In June 1921, Kondubai applied for permission to sell the suit house in order to pay off the debt due under the mortgage and other debts. In February 1922 she submitted another application for the sale of the house to defendant 1, which in the meantime she had privately negotiated. The sale was sanctioned by the District Judge and took place, as I have mentioned, in March 1922. The plaintiff having attained majority in September 1925, received possession of the estate, apart from the house in suit, in October 1925, and brought the suit from which this appeal arises in October 1928. Shortly stated, the basis of the suit is that there was no legal necessity for the mortgage of the house by Radhabai nor for the debts incurred by Kondubai. These transactions were not binding on the plaintiff and as the permission of the Court had been granted without inquiry the order of the Court did not validate the alienation.

The learned trial Judge has found that both the mortgage of October, 1916, and the sale in March 1922, were justified by necessity and also benefited the plaintiff. He found that defendant 1 had made inquiries into the necessity for the loan before the mortgage was executed, and he also found that all the facts were properly placed before the District Judge, so that, apart from any other consideration, the alienee is protected by the Court's order. Accordingly the suit was dismissed. In this appeal the learned counsel for the appellant has contended that Radhabai and Kondubai, the trustees appointed under the will, had no power to purchase land or buildings or to spend money on buildings; that Radhabai had no power to mortgage the house in suit; that there was no necessity to erect a large building on it or to borrow money for the purpose; and that there was ample income available to provide for all necessary expenditure. He has also contended that the debts in respect of which the mortgage was executed were not really incurred for the purpose of building the house in suit nor the other house at Nasik, but that the necessity for borrowing money arose owing to losses in a timber business which the trustees were carrying on together with Keshav, the plaintiff's uncle. This business, according to the learned counsel, was financed by defen-

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dant 1, and the appointment of Kondubai as guardian was merely a dishonest and collusive arrangement to bring about the sale to him.

If this had been an action against the trustees to make them liable for breach of trust, and no sanction of the Court had been obtained for the sale of the house, there might perhaps have been a good case for holding that the purchase of lands and the erection of buildings were not within the powers of the trustees under the will, and that the mortgage and the subsequent sale were neither necessary nor for the benefit of the plaintiff's estate. Strictly speaking the moneys left by the testator ought to have been invested in trustee securities and there should have been no expenditure beyond the available income. Strictly speaking, again, Radhabai had no power to mortgage the property without the concurrence in the transaction of her co-trustee.

At the same time, even if it had been a suit of that nature, a number of difficult questions would have arisen for consideration. Although the estate was valued in the will at Rs. 30,000, a good many of the shares bequeathed to the plaintiff appear to have been worthless or of little value. The Indian Specie Bank failed and went into liquidation, and in place of Rs. 18,000 which was the amount of the fixed deposits mentioned in the will, the trustees actually received a little over Rupees 12,000 only in two instalments in 1916 and 1917. There is no evidence produced in this suit to show what the income available to the trustees was before the purchase of the immoveable property in which they invested part of the capital. No attempt has been made to show what the necessary expenditure amounted to. The testator left no house. Something obviously had to be done to provide a home for the various beneficiaries under the will and to provide a regular source of income. It is at least arguable, I think, that S. 36, Trusts Act, might permit of the investment of part of the capital in lands and buildings, and it is not clear that such use of the money would be contrary to the principles enunciated in 59 Bom 525 (1). It is true that where there are two or more trustees they are bound to act together: S. 48 of the Act. But in Agnew's Law of Trust in British India, p. 246, Edn. 2, cases are cited to show that an act done by one trustee may be subsequently approved by the other. It is quite clear that Kondubai approved of this mortgage and indeed she was one of the persons who attested it. In any case, the plaintiff could not be allowed to approbate and reprobate. He could not retain the properties acquired for him and repudiate all the liabilities incurred in acquiring them. If the transactions themselves could be set aside, he would have to restore the property or pay compensation in so far as his estate had benefited. The plaintiff has been maintained for all these years and has apparently had a good education. No accounts have been produced to show what moneys have been expended on this or whence the money was obtained. In fact, no accounts have been produced about anything, and no explanation of this has been offered in the evidence. The plaintiff's uncle Keshav has deposed that he kept detailed accounts and handed them over to the plaintiff. It is by no means clear that the plaintiff's conduct in this respect has been altogether straightforward.

The trial Judge has found after examining the evidence that the mortgage of October 1916 was executed in respect of moneys borrowed for building the house in suit and the other house which was built on the open site at Nasik. This finding appears to me to be correct. It is true that Radhabai and Kondubai did take part in a timber business which was carried on by Keshav. Defendant 1 has admitted in his evidence that he advanced Rs. 2,000-3,000 to Radhabai in connection with his business in 1916-17 and that he also advanced large amounts to one Yamaji who was one of the partners in the business. He states, however, that this business was not going on; at any rate, he advanced no money in connection with it, until after the mortgage, and that the moneys for which the mortgage was effected were all lent for building the houses. There are on record a number of promissory notes executed by Kondubai between the years 1916 and 1921, and some of the debts which were paid off out of the purchase money, after the sale of the house in suit, were, it appears, debts contracted for the purpose of the timber business. But of course defendant 1 was not responsible for the application of the

1. Hemraj Dattubuva v. Nathu, 1935 Bom 295 =157 I C 406=59 Bom 525=37 Bom L R 427 (F B).

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moneys by the Deputy Nazir after the sale had been sanctioned. There is nothing except the evidence of the plaintiff's uncle Keshav to contradict defendant 1's statements as to the nature of the mortgage debt. Keshav has no doubt alleged that the building work was financed with the money received from the Tata Iron shares and from the Indian Specie Bank, and that the moneys borrowed from defendant 1 were all required for the business. But I think it would be unsafe to rely on the evidence of this man who comes forward, years after the event, professing to make a clean breast of his own turpitude as guardian—(he admits that he was helping in the management of the plaintiff's estate)—in order to help his nephew to repudiate the liabilities incurred on his behalf. If he had produced the detailed accounts which he says he kept, and if they had supported his story, it would have been a different matter. But, as I say, these accounts are not forthcoming. However, in this case we are not concerned, at any rate directly, with any question of the trustees' powers under the will or with the necessity for the mortgage of October 1916. Kondubai was appointed guardian by the Court along with the Deputy Nazir, and the sale sanctioned by the Court prima facie conveyed a good title to defendant 1. He is protected by the Court's order of sanction, unless it is shown that it was obtained fraudulently or by underhand dealing in some way. The leading case on this point is 12 I A 47 (2), where the Judicial Committee observed (p. 49):

> Their Lordships think that when an order of the Court has been made authorizing the guardian of an infant to raise a loan on the security of the infant's estate, the lender of the money is entitled to trust to that order, and that he is not bound to inquire as to the expediency or necessity of the loan for the benefit of the infant's estate. If any fraud or underhand dealing is brought home to him that would be a different matter; but apart from any charge of that kind their Lordships think he is entitled to rest upon the order. Therefore, as regards the principal of this loan, it is sufficient for the plaintiff to say: "I have got the order of the Court."

It is quite true, as the learned advocate for the appellant says, that the actual point which their Lordships had to decide in that case was whether interest should be allowed at twelve per cent or eighteen per cent, and also that it was a case of a mortgage and not of a sale. But, in my opinion, there is no distinction in principle between one kind of alienation and the other for the present purpose, and the observation of their Lordships, which I have quoted, was made by way of criticizm of an expression of opinion by one of the learned Judges of the High Court suggesting that in spite of the Court's orders of sanction, it was necessary for the alienee to prove that the transaction was in the interest of the minor. In 45 Mad 429 (3) a Bench of the Madras High Court held that the only effect of the District Court's sanction to an alienation under the Guardians and Wards Act is to shift the burden of proof from the alienee to the minor seeking to impugn the transaction. But in a later case, 50 Mad 217 (4), this ruling was dissented from and it was held that:

> Where an alienation by way of mortgage or sale has been made by the guardian of a minor, appointed under the Guardians and Wards Act, with the sanction of the District Court, the alienee can rely upon it, and the alienation must be upheld unless the alienee has been a party to a fraud or collusion or has been guilty of any underhand dealing.

After referring to *Gungapershad's* case (2), Venkatasubba Rao, J. says (p. 220):

> These words are clear and unequivocal. Let us look at the reason of the thing. The legislature has cast upon the Court the duty of enquiring whether the transaction is beneficial to the minor. No sanction can be granted unless the Court is satisfied that it is. The lender or the purchaser is no longer harassed by doubts as to the character of the transaction. He looks at the order authorizing the mortgage or the sale. An order of a competent Court is produced to him and is he not entitled to act upon it? The very object of the sections to which I have referred is to safeguard the interests of the minor. A transaction is not authorized unless the Court comes to the conclusion that it is for his benefit. From the point of view of the guardian again, if he honestly and frankly tells the Court the circumstances which have led to his application, he will have performed his duty, and as he does not trust to his own judgment but to the judgment of the Court, he can rely upon the sanction in any proceedings that may be taken at some future time against him. From the point of view of the purchaser, his title to the property stands on a better footing than if there had been no sanction, as the question of the beneficial nature of the transaction cannot be re-opened. This incidentally benefits the minor, as a fair price can be obtained for his

2. Gungapershad Sahu v. Maharani Bibi, (1885) 11 Cal 379=12 I A 47=4 Sar 621 (P C).

3. Venkatasami v. Viranna, 1922 Mad 135=65 I C 964=45 Mad 429=42 M L J 333.

4. Raman Chettiar v. Tirugnanasambandam Pillai, 1927 Mad 233=99 I C 660=50 Mad 217=51 M L J 869.

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property. I understand this to be the principle underlying the sections to which I have referred, and the decision of the Privy Council [12 I A 47 (2)] unambiguously declares that this is the effect of those sections. It is quite a different matter, of course, if the alienee is proved to be a party to any fraud or collusion and the proposition contained in the judgment of the Privy Council is made expressly subject to this reservation.

A similar view has been taken by the High Court of Patna in 8 Pat 48 (5). In my opinion the judgments in these cases place the proper construction upon the Privy Council case, and are also correct on general principles. We were referred to a judgment of Kania, J. in 34 Bom L R 1156 (6), where he refers (p. 1161) to certain observations of their Lordships of the Privy Council in 33 Bom L R 988 (7), and says that these observations suggest that, in spite of the Court passing an order of sanction, the purchaser is not absolved from his liability to make the necessary inquiries, and in the event of the minor challenging the transaction, even after an order of the Court is obtained, the mortgagee will have to prove that he had made independent inquiries. With all deference to the learned Judge, however, I am unable to agree that there is anything in the judgment of their Lordships in 33 Bom L R 988 (7) which throws any doubt on the principles laid down in *Gungapershad's* case (2) and the other cases to which I have referred.

I must now briefly refer to the facts in connexion with the various applications to the District Judge. Kondubai applied to be appointed guardian in August 1920. The District Judge examinad her. In his order he said that she seemed to be a capable woman and mentioned that the minor who was then sixteen years of age approved of the appointment. The second application, in which permission was asked for sale of the house, was not made until June 1921. This is hardly consistent with the suggestion that the whole of the proceedings were merely an excuse for getting the property transferred to defendant 1. Kondubai then asked that the house should be sold or such portion of it as was necessary to satisfy the debts, and suggested that this should be done after public notice. In her original application (Ex. 96) she had set out the history of the family and mentioned the provisions of the will. She also referred to the money which had been realised out of the Tata shares and the deposit in the Specie Bank, and stated that these moneys had been expended on the purchase of immoveable property and that debts amounting to Rs. 19,000 had been incurred on repairs to this property and on erecting more buildings with a view to increasing the income of the minor.

In the application in June 1921, details were given of the debts amounting to Rs. 18,712, that is to say, the amounts of the debt were given item by item and the names of the creditors. Full details were also given of the minor's property. On receipt of this application a public notice was published in the Kesari newspaper at Kondubai's request. It was mentioned in the application that one of the creditors had obtained a decree and had attached and was about to sell the house which had been built on the open site. The Deputy Nazir took proceedings to get this darkhast postponed. The house in suit was actually put up for sale, but as the highest bid was Rs. 10,000, the sale was not sanctioned. Then, in February 1922, Kondubai submitted her third application in which she asked for permission to sell the house to defendant 1. The Deputy Nazir was ordered to inquire into this application and on his reporting in favour of it, the District Judge on 13th February 1922 ordered as follows: "After perusing the report of the joint guardian (Deputy Nazir) I accept the offer of Rs. 15,000 made by Kashinath Gopal Lawhate (i. e., defendant 1) for the house." He then proceeded to give directions as to the application of the sale proceeds and the execution of a sale deed with a condition of reconveyance. (I should have mentioned that within ten years on payment of the purchase price plus interest but after allowance for rent received in the interval.) Strictly speaking, the learned District Judge's order, in order to comply with the provisions of S. 31 Guardians and Wards Act, ought to have recited the necessity for the sale or the advantage to be derived from it, but the omission to do this is only an irregularity, and cannot invalidate the order. It was

5. Mahabir Das v. Jamuna Prasad Sahu, 1928 Pat 543=112 I C 438=8 Pat 48=9 P L T 553.

6. In re Dattatraya Govind, 1932 Bom 537=141 I C 697=56 Bom 519=34 Bom L R 1156.

7. Ram Krishna v. Ratan Chand, 1931 P C 136 =132 I C 613=58 I A 173=53 All 190=33 Bom L R 988 (P C).

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so held in the cases already cited, 50 Mad 274 (4), and 8 Pat 48 (5).

The Deputy Nazir was examined as a witness in the case and he has stated in his evidence that Kondubai did not inform him about the business which she had carried on or about the debts incurred in that connexion. It is also a fact that some portion of the money realized by the sale was used in payment of business debts for which the plaintiff was not liable. After the sale had been effected Kondubai made an application (Ex. 111) on 19th July 1922, in which she referred to the timber business started for the benefit of the minor and stated that in that connexion money was due from Keshav which he had no present means of paying. She suggested, therefore, that the Court should sanction a promissory note in favour of the creditor and that a Court bailiff should be employed for collection of arrears due to Keshav. The Deputy Nazir reported that this was an unwarrantable attempt to throw the burden of Keshav's debts on the minor and the District Judge refused Kondubai's request.

I think it may reasonably be said that there should have been a fuller inquiry than appears to have been made into the nature of the debts mentioned by Kondubai in her application and into the question of plaintiff's liability for them, and Kondubai ought to have given fuller details than she did in this connexion. Whether the Court would or should have refused to sanction the sale in that case seems to me to be by no means clear. There certainly was pressure on the estate. The other house had been attached and was in danger of being sold. Refusal to sanction the conditional sale of this house would undoubtedly have meant litigation the result of which could not be foretold with any certainty. Moreover, even if the mortgage were repudiated, the plaintiff could not be allowed to retain the building without repaying what had been spent upon it.

But, in any case, it has to be shown that the District Judge's order of sanction was obtained by fraud or underhand dealing, and in my opinion it has not been shown that it was. Kondubai did give particulars of the creditors and the amounts owing to them. There is no reason to suppose that she deliberately kept back any information from the Court. In the particulars which she gave of the minor's estate in her first application she included an item of Rs. 1,000 as the value of timber. In all probability Kondubai considered that all the debts were equally binding on the plaintiff. Nor would proof of fraud on Kondubai's part deprive defendant 1, the alienee, of the protection of the Court's order unless it was shown that he was in some way privy to it. In my opinion no fraud or underhand dealing has been brought home to defendant 1, and the suggestion that the preceedings under the Act were a mere excuse put forward by a dishonest guardian in collusion with defendant 1 to bring about the sale to him, cannot be said to be supported by any evidence. I have already referred to the omission to produce the accounts which were said to have been kept and which would probably have thrown a good deal of light on the circumstances of the case. I may also mention that Kondubai, although she put in a statement supporting the plaintiff's claim, has not been put into the witness box to support her allegations by evidence. In my opinion there is no sufficient ground for differing from the view taken by the trial Court, and the appeal must, therefore, be dismissed with costs.

Tyabji, J. — The plaintiff sues for a declaration that a sale deed dated 8th March 1922 (when the plaintiff was a minor), affecting the property specified in the schedule to the plaint, is not binding on him, and for recovering possession thereof. The main defence is based on a sale deed conveying the property to the defendant. The deed was executed by the guardian of the plaintiff appointed under the Guardians and Wards Act, 8 of 1890, with the permission of the Court obtained under the Act. The defendant contends that none of the reasons for which a sale so authorized may be avoided exists : S. 30.

The Guardians and Wards Act, S. 30, provides in effect that a disposal of immoveable property by a guardian is voidable at the instance of any other person affected thereby provided that it is in contravention of S. 28 or S. 29. The first of these two sections—S. 28—deals with cases where a guardian has been appointed by a will or other instrument ; and his powers to transfer immoveable property are subjected by the section to the restrictions imposed by the

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will or other instrument appointing him the guardian. In such cases however he may be declared a guardian under the Act, and then, notwithstanding the restrictions in the will or other instrument, the Court which makes the declaration may permit him, by an order in writing, to make a disposal of the immoveable property in a manner permitted by the order, even though it be in disregard of the said restrictions. The other section, contravention of which makes the sale voidable—S. 29—deals with cases where the Court appoints or declares a guardian. This section excepts from its operation cases where the person so appointed or declared is a Collector or a guardian appointed by a will or other instrument. In other cases S. 29 provides that a guardian appointed or declared by the Court shall not without previous permission of the Court make the transfers referred to in the section, which include sales.

It is not in dispute that the sale upon which the defendant relies was with the permission of the Court. The Guardians and Wards Act itself does not refer to any cases or circumstances in which a disposal of immoveable property, though made with the permission of the Court, by a person appointed or declared guardian under the Act, shall be deemed to be in contravention of Ss. 28 and 29, so as to make it voidable under S. 30. It does not state in which cases or circumstances the permission shall be ineffectual. The general principle governing such cases may be taken from 12 I A 47 (2) to be that where an order of the Court authorizes the guardian to enter into a sale, the transferee can rely upon the order of the Court unless any fraud or underhand dealing is brought home to him. Similarly under the Evidence Act, S. 44—though that section is not in terms applicable—judgments, orders or decrees referred to therein (including judgments that a person is absolutely entitled to a legal character or to a property) and proved by the adverse party may be shown (a) to have been delivered by a Court not competent to deliver them, or (b) to have been obtained by fraud, or (c) by collusion. It is admitted by the defendant that if fraud or collusion or underhand dealing is proved, the permission of the Court will not protect the sale. The plaintiff however did not take upon himself the burden to prove want of competence in the Court or fraud or collusion. I shall deal under two heads with the various forms in which the plaintiff's case was put.

First, it was argued in accordance with 45 Mad 429 (3) that the sanction of the Court is only prima facie evidence that the transaction was a good one, but that when the evidence on both sides is before the Court, the Court may come to the conclusion that the sale was improper and not for the benefit of the minor; and that if the Court concludes that it was not for purposes binding upon the minor, the sale may be set aside; that to give effect to the policy of the Guardians and Wards Act, S. 31, it is enough to hold that the burden of proof is shifted to the plaintiff; and that for impeaching the transaction it is not necessary to say that fraud has been made out on the part of the purchaser. This case has been expressly dissented from in 50 Mad 217 (4), for reasons that, with deference, I accept. The Guardians and Wards Act does not speak of any shifting of the burden of proof, but of the sale being permitted by an order of the Court. The question is, in what cases such an order made by a Court competent to make it must be deemed to be ineffectual. The effect that an order under the Guardians and Wards Act, S. 28 or S. 29, permitting a sale ought to have, must depend upon a construction of the particular order, controlled by the extent and nature of the jurisdiction conferred by S. 28 or S. 29 on the Court making the order. That question is different from the question whether the order may be treated as having no effect—as if it had not been made at all.

The plaintiff wishes the order to be considered as not made at all, not because of fraud or collusion—which are admitted as having power to deprive the order of its effectuality; but because he suggests that the order ought not to have been made without further inquiry; that the materials, which so far as can be discovered, had been placed before the Court are insufficient to support the order. The decision of the Privy Council in 12 I A 47 (2) (which requires fraud or underhand dealing before the protection granted by the Court can be nullified), is sought to be distinguished on the grounds: (1) that the particular remarks bearing on this question were obiter; (2) that the Privy

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Council was dealing with a mortgage, and in the present case we have to deal with a sale. As to (1), the observations were a part of the reasoning of their Lordships and cannot be treated as obiter. They enunciate the general principle which is also indicated by the Evidence Act, S. 44. As to (2), there is no reason to distinguish a sale from a mortgage in regard to the applicability of this rule. No authority is needed for this proposition, but an express authority has been cited to us : 54 I A 79 (7).

Secondly, other cases relied upon are rather in the nature of cautions against orders authorizing such disposals being lightly made. They do not deal with the effect of the order after it has been made, nor with the means of taking away all effect from the order. So far as these cases are in the nature of such caution, the reasoning on which they are based may be unhesitatingly adopted. But we are not at the stage at which the powers of the Court to permit or to decline to permit a sale have to be exercised. Nor are we sitting in appeal over the Court empowered to exercise those powers in the first instance. The decision of the Court entrusted with the duty of deciding whether or not to permit the guardian to enter into the sale has already been given. It cannot be treated as having some effect other than that laid down in the Act under which the permission is given, nor is there any ground shown why it should be ignored.

The terms of S. 31, Guardians and Wards Act as well as several decisions were referred to. The section is very detailed. It lays down with great care in what circumstances the Court ought to grant permission to the guardian to do the acts mentioned in S. 29. But S. 31 is not mentioned amongst the sections contravention of which shall render sales voidable. Contravention of Ss. 28 and 29 is alone referred to as rendering the sale voidable. No reference is made to the necessity of the Court having observed in detail and followed out all the provisions of S. 31. It would therefore be going out of our province to consider in this case whether if we had to review or reconsider the order permitting the guardian to enter into the sale which is the subject of litigation, we should have considered that the Court had exercised its discretion wisely or unwisely. I say so as I wish to associate myself with the remarks of my learned brother with reference to the order passed in this case. But I wish to add that there must have been circumstances of which there would be no evidence before us. It is as likely as not that those circumstances would indicate that the order was better justified than now appears. In any case, the order is not before us by way of appeal.

No serious attempt was made, as I have already said, to prove fraud or collusion in the present case. Certain circumstances of suspicion do appear. Perhaps everything was not done exactly in the manner in which it may be admitted that a ward is entitled to expect that the guardian should deal with the ward's property. To that extent I sympathize with the plaintiff. But I do not see how that takes us any further. The plaintiff must recognize that he is a beneficiary under a will. He must take the will as a whole. Under the will the properties given to him were given subject to the trusteeship of two named persons. If those persons were not as wise in safeguarding his interests as they might have been, the plaintiff cannot demand benefits under the will freed from conditions, which have now turned out to be burdens, but which the testator considered as necessary conditions to his bounty. I agree that the appeal must be dismissed with costs.

D.S./R.K. *Appeal dismissed.*

7. Sri Krishna Das v. Nathu Ram, 1927 P C 37=100 I C 130 = 54 I A 79 = 49 All 149 (P C).

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BEAUMONT, C. J. AND N. J. WADIA, J.

Raghavendra Hanmantrao Bennur — Appellant.

v.

Industrial Bank, Guledgud — Respondent.

Second Appeal No. 552 of 1933, Decided on 7th August 1935, from decision of Dist. Judge, Bijapur.

Bombay Co-operative Societies Act (1925), Ss. 54 and 59—Award—Certificate of Registrar on award — Darkhast proceedings filed within three years of certificate are not barred — Whether award is decree of civil Court doubted.

An award was made under S. 54, Bombay Co-operative Societies Act 1925, and a certificate

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was issued by the Registrar ; darkhast proceedings were filed within three years from the date of the certificate :

Held : that they were not barred by limitation, though filed more than three years from the date of award. It was doubtful whether an award made under S. 54 of the Act becomes a decree or order of civil Court within the meaning of Art. 182, Limitation Act. [P 397 C 1]

G. R. Madbhavi—for Appellant.
G. P. Murdeshwar—for Respondent.

Beaumont, C. J. — This is a second appeal from a decision of the District Judge of Bijapur and it raises a short point. In the year 1926 an award was made between the present appellant and the respondent under S. 54, Bombay Co-operative Societies Act of 1925, and under that award the present appellant was directed to pay Rs. 180 and interest to the respondent. On 22nd April 1931, an application was made to the Registrar to grant a certificate under S. 59 (1) (a) of the Act and the certificate was granted on the same date and these darkhast proceedings were filed on 12th March 1932. It is argued that the darkhast is barred by Art. 182, Limitation Act. That article limits the time for the execution of a decree or order of any civil Court. Now it seems to me perfectly clear that the award of an arbitrator made under S. 54, Bombay Co-operative Societies Act, is not a decree of a civil Court; but it is suggested that it has the characteristics of a decree of a civil Court under S. 59. That section, so far as material, provides that every order passed by the Registrar or his nominee or arbitrators under S. 54 shall, if not carried out, be executed on a certificate signed by the Registrar or by any civil Court in the same manner as a decree of such Court. It may perhaps be said that when a certificate is granted by the Registrar the award of the arbitrator should be treated as a decree of a civil Court, but that does not help the appellant, as the darkhast proceedings were filed within three years of the date of the certificate. I rather doubt myself whether the award even becomes a decree of a civil Court within the meaning of Art. 182, Limitation Act ; but it is not necessary to consider that point. The view of the learned District Judge was that the darkhast proceedings were in time because they were filed within three years of the date of the grant of the certificate by the Registrar, and in my opinion that decision is right. The appeal must therefore be dismissed with costs.

N. J. Wadia, J.—I agree.

A.L./R.K. *Appeal dismissed.*

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BEAUMONT, C. J. AND RANGNEKAR, J.

Sarupchand Pannalal—Applicant.

v.

Commissioner of Income-tax—Opposite Party.

Civil Appln. No. 1074 of 1935, Decided on 11th March 1936.

(a) Income-tax Act (1922), S. 13—S. 13 is no bar to assessee changing method of accounting—But new method must be regular and not merely for casual period.

Section 13 does not prevent the assessee from altering the regular method of accounting he has once employed. What he must alter, however, is his regular method and start a new regular method and not merely a new method for a casual period. [P 398 C 1]

(b) Income-tax Act (1922), S. 66 (3)—Question of fact or law—Whether Commissioner was wrong in not accepting changed method of accounting involves question of fact and hypothetical question of law.

Where the question is whether the Income-tax Commissioner was wrong in not accepting the changed method of accounting adopted by the assessee, that question is not purely a question of law but involves a question of fact and a hypothetical question of law. No reference to High Court can therefore be made under S. 66 (3). [P 398 C 2]

G. C. O'Gorman and *Y. V. Dixit*—for Applicant.
K. McI. Kemp and *A. P. Lillie*—for Opposite Party.

Beaumont, C. J.—Application No. 1074 of 1935 is an application to the Court asking us to direct the Commissioner of Income-tax, Bombay, to state a case raising a point of law under S. 66 (3), Income-tax Act. The point involved is a very short one. The assessee in partnership with his cousin carries on the business of money-lending, and until the accounting period, which is Samvat year 1988, ending in November 1932, the assessee's firm adopted what is known as the mercantile basis of accounting, that is to say, they showed the income accruing in any year as being the income on which assessment was to be based, and not the income received during that year. Shortly before the accounting period in question the

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assessee and his cousin quarrelled. Litigation is going on for the partition of their estate and business, and the debtors of the firm refuse to pay interest, because they do not know which of the partners will ultimately be entitled to it. Consequently the actual amount received for interest is very much less than the amount shown in the books as accrued interest, and that being so, the assessee desires to change his method of accounting from the mercantile method to the cash method. The learned Commissioner has refused to accept that. I desire to say that I am not altogether in agreement with the reasoning on which the learned Income-tax Commissioner bases his order. S. 13 of the Act provides that income, profits and gains shall be computed in accordance with the method of accounting regularly employed by the assessee. The Commissioner says that the regular method is the mercantile method, and he must adopt that. That may be so, but, at the same time, it seems to me impossible to contend that an assessee is never at liberty to alter the regular method which he has once employed. What he must alter however is his regular method, that is to say, he must abandon what, up to that time, has been his regular method, and start a new regular method, and not merely a new method for a casual period.

It seems to me plain that there must be a power to change, because supposing that an assessee were to keep his accounts on the mercantile basis down to the year 1930, and then for five years he were to keep his accounts on the cash basis, it could hardly be suggested that at the end of the five years his regular method of accounting was still the mercantile method. But if a change has been made, it must have been made at some definite moment of time. The learned Commissioner is however entitled to require proper evidence that the regular method of accounting has been changed. If the Commissioner is satisfied that at a particular moment the assessee has changed his regular method of accounting, he is not likely to be satisfied in the following year, or a few years later, that the regular method has been changed again back to the old method. The assessee is not entitled to change his method of accounting from year to year as suits him best; the reference in S. 13 to the regular method of keeping accounts precludes any practice of that sort. But although I think that the reasoning of the learned Commissioner is in some respects wrong, because he certainly seems to suggest that a method once regularly adopted can never be changed, I think the question of law which the assessee desires us to direct the Commissioner to raise does not really arise.

The question suggested is whether on a true construction of S. 13 of the Income-tax Act, the Income tax Officer was wrong in law in not accepting the method of accounting employed by the assessee since Samvat year 1988. Now that question really involves an actual question of fact, and a hypothetical question of law. First of all, has the regular method of accounting been changed? That is a pure question of fact, and the only point of law would be a hypothetical one, namely, if the regular method has been changed, is the Commissioner bound to adopt that change? I do not suppose the learned Commissioner would dispute that he is bound to recognise a changed method, and the only real question is whether he ought, or ought not, to have been satisfied that the method has been changed, which, as I say, is a pure question of fact on which it is not open to us to differ from the learned Commissioner. In my view, therefore, there is no point of law which arises on the assessment which we can direct the learned Commissioner to raise. The application, therefore, must be rejected. With regard to Application No. 1075 of 1935, it is an application by the assessee in respect of the next following year. The same considerations apply, except that obviously it is rather easier to prove for the subsequent year that the regular method has been changed than it was for the earlier year, but no more law arises in the second application than the first. Therefore both applications must be rejected with costs on the original side scale to be taxed by the Taxing Master.

Rangnekar, J.—I agree; but as the question of construction of S. 13 has been raised in the course of the discussion, I should like to state shortly my view of the section. The section says that income, profits and gains shall be computed for the purposes of Ss. 10, 11 and 12 in accordance with the method of accounting regularly employed by the assessee. It follows from that section that when an

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assessee says that the method which he has followed has been regularly employed by him, the question whether that is so or not is entirely for the Income-tax authorities, and any opinion expressed by them would amount to nothing more than a finding of fact, and would not entitle the assessee to come to this Court. But I do not agree with the Commissioner that it is not open to a person to change a method which he has regularly employed for some years at any period in any particular year. There is nothing in the section or the Act to prevent an assessee from changing his method. He has of course to satisfy the Income-tax authorities that he is doing so in good faith, and if the revenue is not likely to be defrauded, I think the Income-tax Officer will accept the new method, and if he refuses, his discretion can be questioned on an appeal to the superior officers.

A.L./R.K. *Application rejected.*

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BEAUMONT, C. J. AND DIVATIA, J.

Harilal Chhotalal Shah and *another*—Plaintiffs—Appellants.

v.

Chaturbhai Punjabhai and *others*—Defendants—Respondents.

First Appeal No. 46 of 1934, Decided on 26th March 1936, from decision of First Class Sub-Judge, Nadiad, in Special Darkhast No. 3 of 1933.

(a) Bombay Bhagdari and Narwadari Act (5 of 1862), S. 1—Lands unrecognized divisions of bhag—Neither can they be attached and sold nor receiver appointed in execution.

Under S. 1, Bhagdari and Narwadari Act (1862), lands which are unrecognized sub-divisions of a bhag can neither be attached and sold in execution of a decree nor can a receiver be appointed to collect rents or profits of the property: *Holmes* v. *Millage*, (1892) 1 *Q B* 551 and *In re Shephard*: *Atkins* v. *Shephard*, (1889) 43 *Ch D* 131, *Ref.* [P 399 C 2; P 400 C 1]

(b) Decree — Execution — Appointment of receiver—Future income.

A receiver of possible future income of property cannot be appointed because such income is not by itself definite property of the judgment-debtor at the time of the receiver's appointment. [P 400 C 2]

R. H. Pandya, *R. M. Mankodi* and *G. S. Dholakia*—for Appellants.

U. L. Shah—for Respondents.

Beaumont, C. J.—This is an appeal against an order in darkhast proceedings made by the First Class Subordinate Judge of Nadiad. The plaintiffs obtained a judgment against the respondents or their predecessors-in-title for the sum of Rs. 11,000 odd. They obtained that judgment on 23rd September 1930. In 1933 they filed the present darkhast asking for sale of certain immoveable property of the debtors, and an interim receiver until sale. At the hearing they asked for the appointment of a receiver by way of execution as an alternative to an order for sale. The learned Judge held that certain of the lands sought to be attached were unrecognized sub-divisions of a bhag, and therefore were not attachable under the Bhagdari and Narwadari Act (Bom. 5 of 1862), and he held that in respect of land which was not attachable under the Act, the Court could not appoint a receiver. I agree with the learned Judge's finding that the lands in question are unrecognized sub-divisions of a bhag, and that point has not been, and could not have been, seriously contested. That being so, the only real question is whether the lands can be attached in execution either by means of a sale or by the appointment of a receiver. S. 1, Bhagdari Act provides that no portion of a bhag or share in any bhagdari or narwadari village other than a recognized sub-division of such bhag or share, shall be liable to seizure, sequestration, attachment or sale by the process of any civil Court, and no process of such Court shall be enforced so as to cause the dismemberment from any such bhag or share or recognized sub-division thereof, of any homestead, and so forth.

Section 3 provides that it shall not be lawful to alienate, assign, mortgage or otherwise charge or incumber any portion of any bhag or share in any bhagdari or narwadari village other than a recognized sub-division of such bhag or share. In the face of S. 1 of the Act, it is, I think, perfectly clear that the property sought to be attached cannot be sold in execution, but it is argued that the Court can appoint a receiver of the rents and profits of such property, and there is a certain attractiveness about the argument, because I am disposed to agree with Mr. Pandya that the appointment of a receiver of the rents and profits would not come within the mischief at which the

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Act was aimed, namely, the sub-division or dismemberment of bhagdari lands. But we have to deal with the very precise language of S. 1. It seems to me that to appoint a receiver of the land would amount to seizure or attachment of the land, and that such appointment is therefore prohibited by the Act. Courts of equity have always been willing to assist a creditor who cannot get paid and who is unable to enforce legal execution because of some peculiarity in the property sought to be attached. Where a difficulty of that sort exists, a Court of equity would appoint a receiver. But Courts of equity have always refused to allow their jurisdiction to be invoked in order to render property attachable which is not attachable at law: see for example, (1893) 1 Q B 551 (1), and as to the general principles on which Courts acted in appointing receivers by way of equitable execution: see (1889) 43 Ch D 131 (2). But then it is argued that we might appoint a receiver of the rents and profits of the land as and when they come to the hands of the debtor, and that we might direct the debtor to hand over such rents and profits to the receiver. So far as the money sought to be attached consists of rent payable under a contract to the debtor, I apprehend that any such moneys could be reached in execution by the ordinary method of attachment by garnishee proceedings. So far as the profits of the land are concerned, if the receiver is himself to take those profits, it can be by entering into possession of the land, and to empower him to do that, would be, as I have said, to disregard the words of S. 1.

If we appoint a receiver of the profits to be made by the judgment-debtor out of the land, then we are really appointing a receiver of unearned income which, at the moment, has no existence, and the Court never appoints a receiver of possible future earnings. In my opinion therefore although there is, no doubt, something to be said from the point of view of abstract justice on behalf of the order for which the appellant asks, the language of the Bhagdari Act is too strong for us, and prevents us making any such order. I think therefore the judgment of the learned Judge was right, and that we cannot make any order on these darkhast proceedings in respect of the lands which form unrecognized sub-divisions of a bhag. The appeal therefore must be dismissed with costs. Costs to be set off against the moneys due to the decree-holder.

Divatia, J. — I agree. This appeal raises a somewhat novel point under the Bhagdari and Narwadari Tenures Act. The judgment-creditor applies for execution of the decree by the appointment of a receiver for certain lands of the judgment-debtor which form part of an unrecognized sub-division of a narwa and as such are not liable to seizure, sequestration, attachment or sale by the process of any civil Court under S. 1 of the Act. As they are not liable to seizure or attachment by the process of any civil Court, it is clear that a receiver cannot be appointed to take them in his possession and management because that would amount to their seizure or attachment by the Court through its officer. But, it is contended, the judgment-debtor could be directed to hand over whatever income he receives from them to a receiver who would hand it over to the Court towards the satisfaction of the decretal amount. It is well recognized that a receiver of possible future income of property cannot be appointed because such income is not by itself definite property of the judgment-debtor at the time of the receiver's appointment. Moreover it would be infructuous or at any rate inconvenient to appoint such receiver as he cannot himself manage the judgment-debtor's interest in the lands, and will have to find out its real income for himself. The difficulty is aggravated in the present case by the fact that there are, along with the judgment-debtor, co-sharers in the joint narwa holding who are not affected by the decree. I agree therefore that the appointment of a receiver in execution is neither legal nor convenient in the present case.

V.B./R.K. *Appeal dismissed.*

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1. Holmes v. Millage, (1893) 1 Q B 551=62 L J Q B 380=68 L T 205=4 R 332=41 W R 354 =57 J P 551.
2. In re Shephard: Atkins v. Shephard, (1889) 43 Ch D 131=59 L J Ch 83=62 L T 337=38 W R 133.

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DIVATIA, J.

Louis Dreyfus & Co. — Plaintiffs — Applicants.

v.

Basappa Lingappa Bagur, Firm — Defendants—Opponents.

Civil Revn. No. 314 of 1935, Decided on 3rd February 1936, against order of Dist. Judge, Dharwar, in Misc. Appeal No. 40 of 1933.

(a) Civil P. C. (1908), Sch. 2, Paras. 17 and 20—Scope.

The legislature has contemplated a case of a general agreement to refer disputes to arbitration as falling under para. 17, and a specified reference to arbitrators as falling under para. 20. Para. 20 refers to a reference by the parties to arbitration about any dispute that might have arisen between them, while para. 17 may apply to future disputes. [P 402 C 1]

(b) Civil P. C. (1908), Sch. 2, Paras. 17 and 20—Award under Arbitration Act—Para. 20 does not apply, but para. 17 may apply.

An award made by arbitrators under the Arbitration Act cannot be filed under para. 20, Sch. 2, Civil P. C. But it can be filed under para. 17 if the facts of the case come within para. 17. [P 402 C 1]

A. G. Desai and *P. S. Sabnis*—for Applicants.

G. P. Murdeshwar—for Opponents.

Order.—This application has been preferred by the original plaintiffs against an order by the District Judge in appeal, dismissing the plaintiffs' application in the nature of a suit to pass a decree in terms of an award.

The plaintiffs contracted to purchase groundnuts from the defendants and entered into an agreement with them. One of the terms of the agreement was that in case of any dispute whatsoever arising under the contract the same shall be referred to two Europeans of the Bombay Chamber of Commerce, one to be nominated by each party. If any party failed to nominate an arbitrator within seven days from the date of the request by the other, the other party had the right to nominate both. In case the arbitrators did not agree they would appoint an umpire who must be an European member of the Chamber of Commerce. If the arbitrators did not agree as to the choice of the umpire within three days, the chairman of the Bombay Chamber of Commerce or the gentleman acting for the time being as such would be empowered to nominate one of them. A dispute arose between the parties and the plaintiffs asked the defendants to nominate their arbitrator. That was not done. The plaintiffs then nominated both the arbitrators, who, purporting to act under the Indian Arbitration Act of 1899, made an award, and the plaintiffs filed an application under para. 20, Sch. 2, Civil P. C., to have that award filed and a decree passed in terms thereof.

The trial Court acceded to the plaintiffs' request holding that the application under para, 20 was maintainable. The appellate Court reversed that decision and held that this could not be said to be a reference to arbitration within the meaning of Sch. 2, and that the Court had no power to pass a decree in terms of the award under para. 20. According to that paragraph, where any matter has been referred to arbitration without the intervention of a Court and an award has been made thereon, any person interested in the award may apply to the Court for filing it. Now "a reference to arbitration" has been dealt with in para. 1 of Sch. 2, which says that where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may apply to the Court for an order of reference, and under para. 2 the arbitrator shall be appointed in such manner as may be agreed upon between the parties. Now this reference implies that both the parties should appoint some persons as arbitrators, and then apply to the Court for an order of reference to arbitration. There is, however, no reference of this kind in the present case. There is only an agreement between the parties, one of the clauses of which is that if any dispute between the parties arises in future, it should be referred to the arbitration in the manner laid down in the agreement. That in my judgment would fall not under para. 20, but under para. 17, Sch. 2 which says :

Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

So this paragraph refers exactly to the agreement of the kind we have here. The procedure provided for under this paragraph is that an application should be made to the Court for enforcing that agreement, that the other side should be

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served with a notice thereof to show cause why the agreement should not be filed, and if no sufficient cause is shown, the Court has to direct that the agreement should be filed and it shall make an order of reference to the arbitrator appointed under the agreement. Thus the agreement itself must be filed in suit, and the reference to arbitrators, the making of the award and filing thereof are a subsequent stage. It is clear that the legislature has contemplated a case of a general agreement to refer disputes to arbitration as falling under para. 17, and a specified reference to arbitrators as falling under para. 20. Para. 20 refers to a reference by the parties to arbitration about any dispute that might have arisen between them, while para. 17 may apply to future disputes as in the present case. Therefore, I think, the lower appellate Court is right in holding that para. 17 applies, and, therefore, the trial Court had no jurisdiction to pass a decree acting under para. 20. Besides the award is purported to have been made by the arbitrators under the Indian Arbitration Act, and an application to file such an award cannot be made under Sch. 2, Civil P. C.

But at the same time, it does not necessarily follow that the application made by the plaintiffs should be dismissed. As para. 17 applies to the facts of this case, the petitioners should be given liberty to amend their petition so as to make it in conformity with para. 17, and then after it is registered as a suit, notice should be issued to the other side. The proper order will, therefore, be that the petitioners should be allowed to amend their application so as to bring it in conformity with the provisions of para. 17, and the Court will then proceed to act under the procedure provided in that paragraph. The rule is discharged with costs.

V.B./R.K. *Rule discharged.*

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BROOMFIELD AND TYABJI, JJ.

Shankar—Appellant.

v.

Prabhakardixit and *others* — Respondents.

First Appeal No. 133 of 1930, Decided on 19th March 1936, from decision of First Class, Sub-Judge, Belgaum, in C. S. No. 288 of 1927.

Civil P. C. (1908), S. 11—Former suit by widow's adoptee to recover possession against widow's alienee—Suit dismissed solely on ground that adoptee had no cause of action during widow's life but held to be maintainable after widow's death—Subsequent suit for possession by adoptee's alienee brought after widow's death—Decision in former suit though wrong held not res judicata against plaintiff's suit for possession but was res judicata against defendant's plea that cause of action for suit for possession arose on date of adoptee's adoption.

A widow transferred the property of her deceased husband to a third person and adopted a son. The adopted son brought a suit against the alienee of the widow to recover possession of property. The suit was dismissed solely on the ground that the adopted son had no cause of action to bring a suit for possession during widow's lifetime, but it was held that the suit was maintainable after widow's death. Subsequent to this decision the adopted son sold the property to his natural father who in his turn sold it to a different person who brought a suit to recover possession of property after the death of the widow:

Held: that as the decision in the former suit simply held that the suit was not maintainable during widow's lifetime but was maintainable after widow's death, the decision was not res judicata against the plaintiff in subsequent suit for possession brought after widow's death, but, though wrong, was res judicata against defendant's plea that the cause of action for suit for possession arose on the date of adoption and that therefore the suit was barred by time. [P 404 C 1]

Held also: that it was not open to the defendants to approbate and reprobate: 11 *Bom L R* 46 and 21 *W R* 374, *Ref.* [P 404 C 1]

G. N. Thakor and *K. J. Kale*—for Appellants.

B. D. Belvi—for Respondents.

Broomfield, J.—This appeal arises out of a suit for possession of property which originally belonged to one Appadixit Kashinathdixit together with mesne profits. Appadixit died without issue in 1865. He left a widow Shivubai who in 1877 transferred the property by a registered deed to Bhaudixit, a cousin of her husband. Bhaudixit at the same time agreed to pay her maintenance as long as she lived. In 1900 she adopted a son named Ishwardixit, and the latter in 1902 brought a suit (No. 563 of 1902) in the Soundatti Court against Bhaudixit to recover possession of the property. The trial Court and the Court of first appeal allowed the plaintiff's claim, rejecting the defences of Bhaudixit that the adoption was not proved and was not valid, and that the suit was barred by adverse possession. In second appeal however it was held by this Court in *Bhaudixit* v. *Ish-*

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wardixit (1) that the adopted son had then no cause of action and Bhaudixit was entitled to hold the property as long as Shivubai was alive. The decision was based on a Madras case, 26 Mad 143 (2), where it was held that :

Where there is an alienation by a widow not for a necessary purpose, the subject of the alienation is severed from the inheritance only during the widowhood, and the remainder therein vests, at the moment of adoption, in the adopted son, as a vested remainder to fall into possession at the termination of the widowhood.

At the conclusion of his judgment Russell, J. said:

No doubt it would be perfectly competent to the plaintiff to attack this alienation after the death of Shivubai, but during her lifetime we do not think he is entitled to assail it.

and Batty, J. said:

I would therefore dismiss the suit . . . simply on the ground that, as laid down in 26 Mad 143 (2) until the termination of the widow's interest, the plaintiff cannot sue as adopted son to recover possession of the property in suit.

Shortly after the decision of the case in the High Court, Ishwardixit sold the property to his natural father Prabhakardixit and the latter in turn sold it to the present plaintiff. Shivubai died in 1925, and in August 1927 the plaintiff brought the suit, from which the appeal arises, for possession of the property. The defendants are, Prabhakar, the natural father of the adopted son (defendant 1), Ishwardixit, the adopted son himself (defendant 2), Bhaudixit, the alienee (defendant 3), and the latter's sons and various other persons claiming under him. Various defences were raised to the suit, but the issues which are material for our purpose in the present appeal are only three: issues 4, 5 and 6, in the trial Court, viz., (4) when did the cause of action for possession arise? Whether on the date of defendant 2's adoption or on the date of the death of Shivubai? (5) Is the suit for possession in time? (6) Whether the suit is or is not barred as res judicata by the High Court judgment in the previous suit? The trial Court dismissed the suit on the ground that it is barred by limitation owing to the adverse possession of defendant 3 from the date of defendant 2's adoption, and also on the ground of res judicata. The trial Judge held that as the former suit brought by the adopted son for possession of the property was dismissed, the plaintiff, who claims under him, is barred by res judicata from suing for the same relief on the same cause of action.

It will be convenient to deal with the question of res judicata first. The learned counsel, who appears for the appellant, contends not only that the lower Court is wrong in holding that the present suit is barred by res judicata, but also that the decision in the previous suit is res judicata against the defendants, and stands in the way of their setting up a defence that the present suit is barred by time. As I have already stated, what was decided by the High Court in the former suit was that it was not open to the adopted son to challenge the alienation by Shivubai during her lifetime, but it was left open to him to sue for possession after her death, and indeed, Russell, J. expressly stated that it would be perfectly competent to the plaintiff to attack the alienation after Shivubai's death. It is difficult to see therefore how it can even be argued that anything was decided in that former suit which is a bar to the adopted son, or the plaintiff who derives title through him, claiming possession after the death of the widow. The trial Judge's finding that the present suit is barred by res judicata is obviously wrong.

However it is not enough for the plaintiff to show that there is no bar of res judicata against him. He has to show that his suit is within time. In that connexion it must be pointed out that in 33 Bom 88 (3) this High Court dissented from 26 Mad 143 (2), and also from the decision in this very case which had followed that Madras ruling. The Madras ruling was itself overruled in 41 Mad 75 (4). It appears, therefore, that the law was wrongly laid down, and according to the proper view of the law the present suit, but for the decision in the previous suit, would be barred by time, the possession of defendant 3 having been adverse from the date of the adoption in 1900. Therefore, it is necessary for the plaintiff to show that the decision of the High Court in the former suit is res judicata in his favour or that the defendants are

1. S. A. No. 146 of 1905, decided on 16th August and 20th September 1905, by Russell and Batty, JJ.
2. Sreeramulu v. Kristamma, (1902) 26 Mad 143=12 M L J 197.
3. Ramakrishna v. Tripurabai, (1908) 33 Bom 88=10 Bom L R 1029.
4. Vaidvanatha Sastri v. Savithri Ammal, 1918 Mad 469=42 I C 245=41 Mad 75=33 M L J 387 (F B).

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estopped in some way from setting up the plea of limitation.

The learned counsel for the appellant contends that the decision of this Court in 1905 is conclusive on the point that the cause of action for the adopted son to recover possession of the property arose only on the death of the widow, and that the present defence, accepted by the trial Court, that the cause of action arose on the date of the adoption in 1900, is barred by res judicata and estoppel, and by the principle that a man cannot be allowed to approbate and reprobate. In our opinion these contentions are correct and must be accepted. Prima facie it is a case which comes clearly within the terms of S. 11 of the Code. The matter is inter partes. The plaintiff claims under the adopted son. Defendant 3 is the alienee. The other defendants claim under him. They are litigating under the same title. There is no question of the competence of the Courts, and inasmuch as the only matter decided by this Court in the second appeal was that the plaintiff as the adopted son was not entitled to possession, because the cause of action had not arisen, that must be held to have been a matter directly and substantially in issue. On the face of it, moreover, it is difficult to see why that matter should not also be held to have been finally decided. It is true that the finding that the adopted son had no right to obtain possession till after the widow's death was based on a mistaken view of the law. Subsequent decisions have corrected that view of the law and have shown that the reasons on which the judgment was based were unsound, and that in the absence of proof of necessity for the alienation the adopted son should have been awarded possession in the former suit. But that does not affect the binding nature of the decision as to the rights of the parties. The only ground on which the learned advocate for the respondents has attempted to support the decision of the trial Court is a passage in Sir Dinshah Mulla's Edition of the Code, Edn. 10, p. 80, where it is stated that :

> A decision cannot be said to have been based upon a finding unless an appeal can lie against that finding.

The authority cited for this proposition is a passage from Savigny :

> Everything that should have the authority of res judicata is, and ought to be, subject to appeal, and reciprocally an appeal is not admissible on any point not having the authority of res judicata,

and a decision of the old Punjab Chief Court, 157 P R 1899 (5). The proposition, we think, is much too broadly stated and the Punjab judgment, which we have looked at, does not really support it in that general form. The point actually decided was simply that a finding on an issue which is not necessary is not res judicata. As to that, of course, there can be no dispute. 18 Bom 597 (6) is a decision of this Court to the same effect. But here of course it is impossible to say that the finding in question was not necessary for the decision of the suit. It formed the one and only basis on which the decrees of the lower Courts, awarding the adopted son possession, were set aside.

There seems to be no real authority for the view that an adverse finding against a successful party or against a party who has no right of appeal can never be res judicata, though it is quite true that a finding on an issue is not res judicata if the decree has been made in spite of the finding and not in consequence of it : 12 I A 23 (7), 48 I A 49 (8) ; and 57 Cal 872 (9) is an authority, if any be needed, for the proposition that even a successful party may be bound by res judicata. That case may also be referred to on the point that a party cannot be permitted to take up two inconsistent positions in Court especially when the one preceding arises out of the other. The principle of res judicata is mutual. A judgment, if binding upon one party, is binding upon both and not merely as against the person who is defeated in a suit : 6 C L J 621 (10). In 11 Bom L R 46 (11) it was held that :

> Where in a suit the plaintiff sets up a certain right and asks for relief, but the Court holds that he is not entitled to the right and dismisses the suit on the ground that the right has not come into existence, the plaintiff can

5. Narain Das v. Faiz Shah, (1899) 157 P R 1899 (F B).
6. Ghela Iccharam v. Sankalchand Jetha, (1893) 18 Bom 597.
7. Rajah Run Bahadoor Singh v. Mt. Lachoo Koer, (1884) 11 Cal 301=12 I A 23=4 Sar 602 (P C).
8. Midnapur Zamindari Co. v. Naresh Narayan Roy, 1922 P C 241=64 I C 231=48 I A 49=48 Cal 460 (P C).
9. Mahammad Ismail v. Sharfutullah, 1930 Cal 810=129 I C 310=57 Cal 872.
10. Lilabati Misrani v. Bishun Chobey, (1907) 6 C L J 621.
11. Raja Bahadur Shivalal v. Rajeevappa, (1908) 11 Bom L R 46=1 I C 319.

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bring another suit for that right and relief when the right accrues.

The question of res judicata or estoppel did not actually arise in that case. But 21 W R 374 (12) is a case clearly in point. That was a suit to recover money lent on a mortgage which the defendant had refused to register. The defendant then put a certain construction upon the agreement between the parties which was accepted by the Court and the claim was dismissed as premature. When the plaintiff sued again after the time fixed by the agreement, it was held that it was not open to the parties or to the Court to say that the first construction was wrong. Markby, J. said (p. 374):

> Whether the decision in the first case was right or not it is not necessary (as it seems to me) for us to consider. The defendant upon the former occasion put forward what he considered to be the true construction of the arrangement between the parties. That was accepted by the Court which then tried the suit as the right construction, and it is not open now to the parties to say that that construction was wrong, nor is it open to the Court to say so. That decision is binding as between these parties, and it must be acted upon.

That, in our opinion, applies with equal force to the present case, and it makes no material difference that the arguments of the alienee on the former occasion, which were accepted by the Court, involved a mistaken view of the law as to the rights of an adopted son. Further, on the point that a party cannot take up inconsistent positions, reference may be made to Caspersz on Estoppel, para. 441, p. 392, and 60 I A 266 (13). It may be noted that Bhaudixit, the alienee, has had the advantage of the decision in his favour by being allowed to remain in possession of the land for the last thirty years. On this part of the case there is, in our opinion, no effective answer to the argument of the learned counsel for the appellant. One minor point was urged on behalf of the respondents, viz., that the sale in plaintiffs' favour conveyed no title to the property. The argument is that the effect of the decision of this Court in the former suit was that the adopted son had no present interest in the property; that he was in the position of a reversioner merely and had nothing but a *spes successionis* which could not be transferred. This contention, however, is plainly untenable. Upon the correct view of the law the adopted son was full owner of the land and also entitled to possession even in 1905. But even on the view taken by the Court in the former suit, the adopted son would not be in the position of a reversioner, but would have a vested interest. In either case it is clear that he had an interest in the property which could be validly transferred. The result is that the appeal must be allowed and the decree of the trial Court set aside with costs throughout. There will be a decree in favour of the plaintiff for possession of the property and the trial Court must hold an inquiry as to mesne profits from the date of the suit till the date of delivery of possession or three years from the date of this Court's decree.

Tyabji, J.—I agree. The main question before us depends upon the application of the doctrine of res judicata: Civil Procedure Code, S. 11. Issue 4 in the suit out of which the present appeal arises was:

> When did the cause of action for possession arise? Whether on the date of defendant 2's adoption or on the date of the death of Shivubai?

The answer given by the learned Judge was that the cause of action arose on the date of the adoption of defendant 2, and not on the date of the death of Shivubai. In the previous suit, the only matter decided by the High Court in *Bhaudixit* v. *Ishwardixit* (1) was stated in these words by Russell, J.:

> No doubt it would be perfectly competent to the plaintiff to attack this alienation after the death of Shivubai, but during her lifetime we do not think he is entitled to assail it.

And Batty, J. stated:

> I would therefore, dismiss the suit . . . simply on the ground that, as laid down in 26 Mad 143 (2), until the termination of the widow's interest, the plaintiff cannot sue as adopted son to recover possession of the property in suit.

It will be observed that the learned Judge in the present suit decided the question in terms directly contradictory to the decision of the same question by the High Court in the previous litigation. The former suit was between the same parties as the present suit; though in the present suit persons claiming under some of the parties to the former suit litigating under the same title are also parties. The object of S. 11, Civil P. C.—if I may venture on a general observation — is to give finality to decisions, certainly to prevent contradictory decisions, bet-

12. Mt. Bibee Effatoonnissa v. Khondkar Khoda Newaz, (1874) 21 W R 374.
13. Ambu Nair v. Kelu Nair, 1933 P C 167=143 I C 433=60 I A 266=56 Mad 737.

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ween the same parties. It is not questioned that the previous suit was in effect between the same parties and that the Court was competent. As I have just stated the learned Judge reconsidered the very question that had not only been decided before but which was the sole ground of decision in the earlier controversy. The result is that in the earlier decision, the suit was dismissed because it was held that the cause of action had not then arisen, and now it is dismissed on the ground that the cause of action arose at the time when the earlier suit was brought. Moreover, the learned Judge holds that the decision in the previous suit (in conformity with which the present suit is brought) has the operation of preventing the plaintiff from now bringing the present suit—i. e., that the decision of the High Court operates to make a proposition res judicata which is directly contradictory of what was actually decided. The High Court decided that the suit should be brought on the death of the widow; therefore it has been held to be res judicata that the present suit brought on the death of the widow cannot be brought. The learned trial Judge was led to these conclusions on grounds which he stated as follows:

> But as the suit of Ishwardixit (viz., the decision in the suit I have referred to as the previous suit) was wholly dismissed, that decision, Ex. 55, does not according to law operate as res judicata against defendant 3 and defendants 4 to 10 who claim through him and does not preclude them from raising their present contentions: vide R. 1 laid down in Mulla's Civil Procedure Code.

Later on the learned Judge says:

> The plaintiff who claims under the deceased defendant 2 cannot sue defendant 3 and defendants 4 to 10 who claim under him for the same relief on the same cause of action. He is estopped from doing so by the dismissal of the former suit which operates as res judicata against him: vide R. 1 laid down in Mulla's Civil Procedure Code.

It seems to me that if the learned Judge had directed his attention to the terms of S. 11, he would not have reached a decision that seems to me, with all deference, to be manifestly contradictory of the principles of the section. S. 11 in defining the rule of res judicata treats it from three aspects: first, the nature of the matter that must not be tried and dealt with twice; secondly, the two suits, the former suit and the subsequent suit, are considered with reference to (a) the parties to the suits, (b) the title under which the parties are litigating, and (c) the competence of the Courts adjudicating upon the matters in question; and thirdly, the matter in question must have been heard and finally decided by the first Court. Out of these three heads, under which the section may be considered, the present case is concerned with the first and third; what was the matter that had been previously adjudicated upon? and was that matter heard and finally decided, so that it is not to be re-agitated on a second occasion? Following the language of the section as far as possible the relevant provisions seem to be to this effect:

> The matter must have been directly and substantially in issue in the former suit—it must have been alleged in the former suit by one party and either denied or admitted expressly or impliedly by the other; or it might and ought to have been made ground of defence or attack in the former suit; it must have been heard and finally decided in the former suit and it must be the matter directly and substantially in issue in the second suit or in the issue sought to be tried on the second occasion.

The learned Judge has applied different rules instead of directing his attention to the section itself. I do not imply that for the purpose of deciding whether the matter is directly or substantially in issue, whether it is alleged by one party, whether it is denied by the other party, whether it might and ought to have been made ground of defence or attack, whether it has been heard and finally decided, the questions may not be considered and tested in various ways adapted to different sets of circumstances and facts. A variety of tests may help the decision of the questions. Such tests and helps may certainly be availed of. But the rule has to be taken from the section and its explanations, and the section itself must not be lost sight of, neither its terms, nor the mode in which it requires the question to be approached and determined. Whatever tests may at an earlier stage of the discussion be applied, the objective must be to give their proper meaning to the words of the legislature. Ultimately the question and answer—the issue and the decision on it—must conform to the language and the implications of the section. For this purpose the proper course seems to me with great deference to be this. The meaning of the words "matters directly and substantially in issue" must first be determined, and then the decision in the previous suit examined

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to see whether any such matter had been heard and finally decided in the former suit; and if so to refrain from deciding the matter again.

The explanations to the Civil Procedure Code, S. 11, Orders 14 and 15, and the Evidence Act, S. 3, throw light on what matters must be deemed to be matters in issue. The explanations to S. 11 state that the matter must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly by the other; and indicate that the grounds of defence or attack in relation to the reliefs sought, have a bearing on what shall be deemed to be directly and substantially in issue. Under Order 14: (a) before an issue can arise, it is necessary that there should be some proposition of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence; (b) if such a proposition (which is called a material proposition) is affirmed by the one party and denied by the other, then under O. 14, R. 1, an issue arises. The close relation between the judgment of the Court and the parties being at issue on any question is indicated also by the rule that if it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment: O. 15, R. 1.

Taking these provisions together the matter directly and substantially in issue between the parties seems to require attention from the three aspects: (a) The matter must consist of a proposition of fact or law directly and substantially alleged by one party and either denied or admitted expressly or impliedly by the other. (b) Such a proposition has been, or might and ought to have been, directly and substantially the ground of defence or attack, in the sense that the plaintiff directly and substantially did allege or might and ought to have directly and substantially alleged the proposition to show a right to sue, or the defendant alleged it or might and ought to have alleged it to constitute his defence. (c) The matter so determined to be directly and substantially in issue must have been heard and finally decided.

The Evidence Act, S. 3, also deals with these aspects of what must be deemed to be in issue, though from a different situation necessitated by the fact that the Evidence Act and the definitions it contains are concerned with the stage when the trial is in prospect; whereas the doctrine of res judicata operates on the situation arising after the trial has terminated in a decree granting or refusing the relief claimed. The Code refers to questions of law as well as questions of fact which are in issue. The Evidence Act does not define the expression "issues of law." On the other hand the expression "facts in issue" is stated in the Evidence Act to mean and include "any fact from which either by itself or in connexion with other facts the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows." The word "necessarily" seems to supply the place of the words "directly and substantially" in the Civil Procedure Code. I have collected together what seem to be the relevant directions of the legislature. Their bearing on the question must first be exhausted before the necessity for calling in extraneous aid can arise. In the previous suit the proposition alleged by the plaintiff and denied by the defendant was that the same cause of action which is now in question had arisen at the time when the previous suit was instituted. That proposition was the direct and substantial ground of decision. It was directly and substantially the ground of defence and attack; the plaintiff had to affirm it to show his right to sue and the defendant denied it as his defence. The High Court decided the appeal on the sole ground that that proposition had to be answered in the negative.

The learned trial Judge observes that when a suit is wholly dismissed the decision does not operate as res judicata against a defendant. This statement may represent the operation of the rule of law contained in S. 11 on some cases, in which several propositions are in issue between the parties, and in which it is not possible to determine whether the particular matter (relied upon as having been heard and finally decided by the Court) was really the proposition directly and substantially alleged by the one party and denied by the other party, and that the affirmation and denial of that proposition was a ground of defence or attack for showing the right to sue or constituting the defence; so that it is not possible to say that that particular matter was finally decided between the parties

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or that on the decision of that particular proposition depended the grant or refusal of the reliefs sought. A party may fail in spite of the decision of some matters in his favour or succeed in spite of the decision of some matters against him. For this or for other reasons it may occasionally be doubtful or impossible to say that a particular matter was really the matter directly and substantially in issue and that on it depended the grant or refusal of the relief claimed by the plaintiff; or to put it in other words, that that was the proposition the affirmation and denial of which formed the direct and substantial basis of the plaintiff's right to sue or constituted the defendant's defence. I will take a concrete example.

Where a suit is wholly dismissed and there are several issues in the suit, then the issues—say issues (x) and (y)—decided against the defendant may not operate as res judicata, because since the suit was decided in favour of the defendant in spite of the decision against him on points (x) and (y), it follows that the decision of the suit did not depend on the decision of issues (x) and (y); that though the defendant may have actually alleged (x) and (y) as constituting his defence, yet they did not in reality constitute his defence. In fact his defence was held to be irrespective of (x) and (y). The non-existence of the right to the relief sought did not necessarily follow from propositions (x) and (y), though it may have been asserted by the defendant himself. Or, where a number of points are decided against the plaintiff and the suit dismissed, it may or may not be possible to determine whether any particular proposition was the direct and substantial ground for the dismissal.

In other cases in order to determine whether the matter was directly and substantially in issue, it may be easiest to apply such a test as this, whether (assuming that the decision is by a Court subject to appeal) the decision on the matter in question could have been appealed from. This test is apparently based on the following reasoning, viz., that if the decision on a particular matter could not have been appealed from, then the grant or refusal of the relief sought in the suit could not have depended on the decision of that matter. But it is not safe to use such tests without reference to the terms of S. 11. This is well exemplified by the present case.

In the present case there was no complication. The fate of the appeal depended on whether or not the cause of action had arisen. The affirmation and denial of that proposition was ultimately the sole ground of defence and attack in relation to the relief sought. The proposition that the plaintiff had to assert to show a right to sue and which the defendant denied so as to constitute his defence, was that the cause of action had arisen on the adoption; the converse proposition that the cause of action would arise on the death of the widow was also explicitly affirmed and denied. Thus the affirmation and denial of this proposition was the matter directly and substantially in issue, i. e., the matter on which the grant or refusal of the relief sought by the plaintiff directly and substantially depended. There is no question that the decision on the point was final. Under S. 11, therefore, the Court ought not to have tried the issue when the cause of action arose, but ought to have decided on the basis that the cause of action arose on the death of the widow as already decided between the parties. I need not add anything further to what has been stated by my learned brother. I agree that the appeal should be allowed with costs throughout.

D.S./R.K. *Appeal allowed.*

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B. J. WADIA, J.

Calico Printers Association, Ltd. — Plaintiffs.

v.

Gosho Kabushiki Kaisha, Ltd.—Defendants.

O. C. J. Suits Nos. 1141 and 979 of 1935, Decided on 25th September 1935.

Patents and Designs Act (1911), S. 53 (2) (a), (b)—Infringement of registered design — Suit under S. 53 (2) (a) for injunction and damages or for Rs. 1,000 — Remedies alternative and election necessary — Application for election can be made long before hearing.

The two parts of S. 53 apply to two distinct remedies, one for the payment of the sum of money mentioned in it and the other by way of damages. [P 410 C 1]

Where the plaintiffs, who are registered proprietors of a certain design, file a suit under S. 53 (2) (a) praying for an injunction and for an account of the profits made from the sale of goods bearing the pirated design, or to pay damages or in the alternative to pay a sum of Rs. 1,000, the plaintiffs are bound to elect under

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the section between their claim for damages along with the injunction and the payment of the sum of Rs. 1,000, the maxim amount recoverable. [P 411 C 2]

Proper application can be made in Chambers to the Chamber Judge to put the plaintiffs to their election and long before the hearing of the suit : *English cases referred.* [P 412 C 1]

N. P. Engineer and *K. McI. Kemp* — for Plaintiffs.

M. L. Maneksha and *Jamshed Kanga* —for Defendants.

Judgment.—The plaintiffs are the registered proprietors under the Indian Patents and Designs Act 2 of 1911, of a certain design printed on textile piecegoods bearing No. 34681 and duly registered. They allege that the defendants in the two suits respectively have imported into Bombay a large number of cases of Japanese prints having imprinted thereon without the plaintiff's license or consent a design which is identical with and/or a fraudulent or obvious imitation of the plaintiffs' registered design. Plaintiffs have accordingly filed these suits, praying for an injunction against the defendants, and in addition they have asked that the defendants may be ordered to render an account of the profits made by them from sales of the goods bearing the said design, or in the alternative to pay damages, or in the further alternative to pay the sum of Rs. 1,000 under the provisions of S. 53 (2) (a) of the Act. The suits were filed on 18th July and 26th June 1935, respectively, but the summons in the later suit was taken out a few days earlier than in the other.

The points involved in the two summons are substantially the same, and they have therefore been heard together. The summons has been taken out by the defendants in each of the two suits calling upon the plaintiffs to elect whether they claim from the defendants an account of the profits made by the defendants from sales, or damages, or payment of the sum of Rs. 1,000, and for an order that until such election is made all further proceedings in the suits may be stayed. In both these suits plaintiffs applied by notices of motion for an injunction against the defendants respectively. An interim injunction was first granted on an ex parte application made by the plaintiffs, and on the defendants submitting to an injunction at the hearing of the notice of motion in terms of prayer (a), but limited to British India, the interim injunctions were confirmed. The defendants in each suit have been served with the writ of summons, but they have not yet filed their written statements, as they say that they are embarrassed in filing their defence, until they know which of the alternative reliefs claimed in the suits the plaintiffs want to adopt. It is provided by S. 53 (1) of the Act, under the heading "Legal Proceedings," that during the existence of a copyright in a registered design, it shall not be lawful for any person to apply the design or an imitation thereof or cause it to be applied to goods except with the license or written consent of its registered proprietor, or to have the goods sold without such license or consent.

Section 53 (2) (a) provides that if any person acts in contravention of the section, he will be liable to pay to the registered proprietor of the design a sum not exceeding Rs. 500 for every contravention recoverable as a contract debt, provided that the sum so recoverable does not in the aggregate exceed Rs. 1,000. Under S. 53 (2) (b) a registered proprietor can, in the alternative, if he so elects, bring a suit for the recovery of damages for any contravention of the section and for an injunction against the repetition thereof. The two clauses are disjunctive, and the provisions are based on S. 60, English Patents and Designs Act of 1907, being 7 Edw. VII, C. 29. Under the earlier English Act of 1883 called the Patents Designs, and Trade Marks Act, 46 & 47 Vic. c. 57, it was provided by S. 58 that during the existence of a copyright in any design it should not be lawful for any person to contravene the section without the license or written consent of the registered proprietor, and that whoever acted in contravention should be liable for every offence to forfeit a sum not exceeding £50 to the registered proprietor who might recover such sum as a simple contract debt by action in any Court of competent jurisdiction. It was provided by S. 59 of the same Act that, notwithstanding the remedy given by S. 58 for the recovery of the penalty, the registered proprietor of any design might (if he elects to do so) bring an action for the recovery of damages as provided in the section.

In the statute of 1907 these two sections are combined into one section, viz., S. 60, with certain changes. Under it

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the registered proprietor can recover the sum of £50 for each contravention of the section, but the total sum recoverable shall not exceed £100, or in the alternative the registered proprietor can bring a suit for recovery of damages for such contravention and for an injunction against its repetition. As I have said before, the provisions of S. 53 of the Indian Act of 1911 are based on S. 60 of the English Act of 1907. The two parts of S. 53 apply to two distinct remedies, one for the payment of the sum of money mentioned in it, and the other by way of damages and injunction. It is clear that the provisions of S. 53 of the Indian Act apply to the two suits filed by the plaintiffs against the defendants. The questions which arise for consideration are: (1) Are the plaintiffs bound to elect their remedy? (2) between which remedies must the election be made?, and (3) when must the election be made? With regard to the first question, the defendants contend that the Act has created certain rights and liabilities not existing at common law, and has also given certain remedies to the registered proprietor of the design to enforce those rights, that the Act is exhaustive both as regards those rights and remedies, and that as new obligations are created and special remedies provided by the statute for enforcing them, S. 53 must be looked upon as forming a sort of self-contained code of procedure on the subject, and that there are no means of recovery other than the specific means mentioned in the section itself. I do not think it is disputed that, the nature of the statute being as I have described it, this is the only true construction of S. 53: see Halsbury, Vol. 27, paras. 370 and 373 at pp. 188 and 190. S. 53 therefore being a self-contained code in itself, and the two parts of S. 53 (2) being clearly disjunctive as I have said before, there is no doubt that the plaintiffs are put to their election.

The prayers of the two summonses are not exactly alike, but in effect the defendants ask that the plaintiffs may be ordered to elect either for an account of the profits made by the defendants or the payment of damages or the payment of the sum of Rs. 1,000. A question was raised in the course of the argument whether in the event of the plaintiffs electing to recover only the sum of Rs. 1,000 under the Act they would be precluded from claiming and getting an injunction also along with that sum. Plaintiffs' counsel contended that the remedy by injunction for the infringement of a right to property was open to the person whose right was infringed, even if such right was created by statute, unless the statute expressly or by necessary implication excluded the equitable remedy. He relied on (1880) 15 Ch D 501 (1), especially on the observations of Jessel, M. R. at pp. 506 and 507. That was a case under the English Copyright Act of 1842, and the suit was for an injunction against an American firm of publishers from importing into England for sale and from selling or retaining in possession copies of a periodical publication in which plaintiffs had a copyright. The liability for that offence is mentioned in S. 17 of the Act, viz., forfeiture of the offending publication, payment of £10 as penalty for each offence, and a payment of double the value of the forfeited copies of the publication. There is no specific provision in that statute for an injunction, and it was held that an injunction could be granted as an equitable remedy in aid of the statutory remedy.

In (1901) 1 Ch 894 (2), which was a case under the Sidmouth Market Act of 1839 as amended by the Sidmouth Market Act of 1846, it was held by Farwell, J. that, where a statute provided a particular remedy for the infringement of a right to property thereby created, an injunction could be granted to restrain the infringement of the newly created right, unless the statute creating the right had provided a remedy which it enacted should be the only remedy for the infringement. Reference was also made to the judgment of Buckley, J. in (1903) 1 Ch 101 (3), which was a case under the Public Health Act of 1875. On the other hand there is the case (1902) 2 Ch 182 (4). In that case the by-laws under the same Act of 1875 provided for a penalty to be recovered by summary proceedings and it was held by Joyce, J. that the local authority could not enforce

1. Cooper v. Whittingham, (1880) 15 Ch D 501 =49 L J Ch 752=43 L T 16=28 W R 720.
2. Stevens v. Chawn; Stevens v. Clark, (1901) 1 Ch 894=84 L T 796.
3. Attorney-General v. Ashborne Recreation Co., (1903) 1 Ch 101=87 L T 561=72 L J Ch 67=51 W R 125=19 T L R 39=67 J P 73=1 L G R 146.
4. Devonport Corporation v. Tozer, (1902) 2 Ch 182=71 L J Ch 754=86 L T 612.

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the right by injunction, and that the only remedy was that provided by the statute, on the ground that the right as well as the remedy were purely a creature of the statute. Counsel also referred to (1905) 22 R P C 356 (5), in which there was a claim for injunction and damages or penalty and delivery up of the offending articles and costs. Plaintiffs in that case were put to their election between the damages and the penalty claimed, but the injunction was allowed to remain. That was a case under the Patents, Designs and Trade Marks Act of 1883, which makes no mention of the remedy by injunction. When we come to the Act of 1907 we find that a provision is made not only for payment of money, which incidentally is no longer called a penalty, but also in the alternative for damages and injunction.

The same provision is made under S. 53 of the Indian Act of 1911. As S. 53 makes up a self-contained code, it would be arguable whether by electing to claim payment of the sum of Rs. 1,000, and not to claim damages and injunction, the equitable remedy by injunction was by necessary implication excluded. Some important questions will arise for consideration on this point, the first being whether when complete statutory remedies are provided for the new statutory rights created by the statute, the Court has any jurisdiction either in law or equity to travel beyond its terms, and secondly, whether a statutory right to claim only the money provided for in the section could further be protected by an injunction, if the plaintiffs elected to claim the money. I have referred to these questions, as the point was raised by plaintiffs' counsel in the course of his argument, but the point at this stage is really one of academic interest only. Whether in the event of the plaintiffs electing to receive payment of the sum of Rs. 1,000 they will also be entitled to an injunction by way of further equitable relief is a question which must be decided after the election is made. The only question before me now is whether the plaintiffs are bound to elect between an account of the profits or damages and payment of the sum of Rs. 1,000. They claim the injunction in para. (a) of the plaint in each of the two suits. I therefore do not think it necessary to express any particular opinion at this stage on the point raised by counsel.

The plaintiffs cannot have an account of the profits as an alternative to a claim for damages or to a claim for payment of Rs. 1,000. It is not so provided by the statute. If the plaintiffs restrict their claim to damages and an injunction, it may be contended that a liability to account for profits of the goods actually sold is incidental to an injunction. It may also be contended that an account of the profits is the correct measure of the damages due to the plaintiffs, though there are cases in which it has also been held that the correct measure of damages is the injury to the plaintiffs and not the profits made by the defendants. Whether the plaintiffs can claim an account of the profits as incidental to an injunction is a question which will also have to be considered at the hearing. All that I can now say is that the plaintiffs are not entitled to an account of the profits as an alternative to their claim for damages or for payment of Rs. 1,000. Moreover, the plaintiffs have not asked for an account of the profits as an ancillary relief to the injunction claimed. Plaintiffs have however claimed delivery up of the offending goods or articles, but whether they are entitled to it as an ancillary relief is another question to be gone into at the hearing. At present the plaintiffs are bound to elect under the section between their claim for damages along with the injunction and the payment of the sum of Rs. 1,000 which is the maximum amount recoverable.

The last question is, when must the plaintiffs make their election? Counsel for the plaintiffs argued that the defendants would not in any way be prejudiced by reason of the plaintiffs not electing at this stage, and that therefore, there was no question of their being embarrassed in puting in their defence. It was held in (1905) 22 R P C 356 (5), which I have referred to before, that the plaintiffs could not administer interrogatories if they elected to claim the penalty under the old Act of 1883. But it was argued that the claim for Rs. 1,000 under S. 53 was not a claim for penalty, and therefore the defendants would not be able to escape discovery in any event. On the other hand the defen-

5. Titus Astle, Ld. v. Mansfield, (1905) 22 R P C 356.

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dants' counsel argued that the plaintiffs would not be prejudiced either, if they were put to their election within a reasonable time, but before the final hearing of the suit. I think there is force in the defendants' contention that, if the plaintiffs elect to claim only the Rupees 1,000, they may not even enter upon their defence. They have already submitted to an injunction pending the hearing of the suit. And the defendants' counsel admitted that the defendants had committed an infringement in terms of S. 53 (1) (a), viz., by doing something with a view to enable the plaintiffs' design to be applied to goods without their license or written consent. He added that the infringement was confined only to the goods mentioned by the defendants in their respective affidavits in reply on the notices of motion, and that he made the admission only for the purposes of these two suits. There is a clear authority both in (1892) 9 R P C 459 (6) and (1905) 22 R P C 356 (5) that a proper application can be made in chambers to the chamber Judge to put the plaintiffs to their election, and long before the hearing of the suit in both those two cases the statement of claim was ordered to be amended. These two cases are quoted as good law in Halsbury, Vol. 27, para. 1320, at p. 742, in his first edition, of 1913, which was long after the English Act of 1907.

I therefore order the plaintiffs to make the election which I have mentioned before within a month from today. The plaintiffs will make the necessary amendments in the plaint in each suit at their own cost. Defendants to put in their respective written statements within a fortnight after the plaintiffs have made the election and amended the plaint, and intimated the same to the defendants. I have heard counsel on the question of the costs of the two summonses. My attention was drawn to two letters dated 19th and 23rd August 1935, written by the defendants in the two suits respectively to the plaintiffs' attorneys calling upon the plaintiffs to elect. The plaintiffs sent no reply, and thereafter the defendants took out these chamber summonses. The plaintiffs resisted the summons in each suit on the ground, first, as stated in their affidavits in reply, that the defendants could not dictate to the plaintiffs, that is to say, could not ask the plaintiffs to make an election, and secondly on the ground taken at the hearing, that in any event they were not bound to make the election at this stage, but only at the time of the hearing. In my opinion they were wrong in both these contentions. The election is to be made under the statute, and what the defendants asked was that the plaintiffs should not be allowed to postpone the election till the final hearing. I see no reason to depart from the ordinary rule that costs follow the event, and I order the plaintiffs to pay the costs of the defendants of the summons in each suit separately. Costs to be taxed.

Counsel certified.

V.B.B./R.K. *Order accordingly.*

6. Saunders v. Wiel, (1892) 9 R P C 459.

A. I. R. 1936 Bombay 412

BROOMFIELD AND TYABJI, JJ.

Annappa Ramchandra Pai — Defendant 2—Appellant.

v.

Krishna Narayan Prasad and *others*—Plaintiffs—Respondents.

First Appeal No. 110 of 1930, Decided on 18th March 1936, from decision of First Class Sub-Judge, Karwar, in Suit No. 203 of 1928.

(a) Practice—New point—Point as to breach of statutory requirement not taken in trial Court nor in memorandum of appeal must be allowed.

Where a particular point is not taken in the trial Court, nor is it even mentioned in the memorandum of appeal and it appears on the face of the record that there has been a breach of statutory requirement, such point must be allowed to be taken and argued by the Court of appeal. [P 415 C 2]

(b) Civil P. C. (1908), S. 92 — Applicability — It depends upon prayers in plaint at institution of suit — Amendment at later date cannot evade provisions of S. 92.

The question whether S. 92 has to be applied must depend upon the prayers in the plaint at the date when the suit is instituted and the provisions of the section cannot be evaded by an amendment of the plaint at a later date : 1931 *Bom* 33, *Rel. on.* [P 416 C 1]

(c) Trusts—Liability of trustee — Persons entrusted with fund for temple are trustees — Managers of such temple are entitled to call them to account — If such persons are agents to trustees, they are accountable to them alone and not to cestui que trust.

Where the fund is handed over to certain persons in order that they should pay it to the temple or utilize it for the temple, it must be held to have vested in them as trustees for that

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purpose and the managers would be entitled to call them to account: 1935 *Mad* 209, *Rel. on.* [P 414 C 1]

On the other hand if such persons are merely agents of the trustees and the fund is not vested in them the cestui que trust has no remedy against them; they would in that case be accountable to their principals only. [P 414 C 1]

(d) Plaint—Amendment—Points to be considered by Court in allowing or refusing amendments mentioned.

The mere fact that the whole suit would fall to the ground if amendments in the plaint are allowed should not be the only reason in refusing amendments. Before doing so the Court must consider the stage at which the application is made, the nature of the suit, the effect that would result from the amendment and the terms on which the amendment might or might not be permitted. [P 418 C 2]

H. C. Coyajee, D. R. Manerikar and *V. G. Wagle*—for Appellant.

G. P. Murdeshwar and *U. S. Hattyangadi*—for Respondents 4 and 5.

Broomfield, J.—In the suit from which these appeals arise the plaintiffs are the managers of a temple called Shri Mahableshwar of Gokarn. Defendants 1 to 5 are members of a committee called the Kumta Dharmadav Committee and as such they hold and manage a fund called "Dharmadav Fund," which is collected for the benefit of a number of religious and charitable institutions in the neighbourhood of Kumta. Part of this fund has been set apart for the benefit of the Shri Mahableshwar temple and some land has been purchased out of this part of the fund. The plaintiffs brought the suit alleging that the defendants are the trustees of the fund, and that they have been guilty of a breach of trust. The reliefs prayed for are possession of the land purchased out of the fund and recovery of the rest of the amount due to the temple after taking accounts of the fund from the beginning. The trial Court has made a preliminary decree awarding the plaintiffs possession of the land with mesne profits and also directing the taking of accounts of the fund in the hands of the defendants. A Commissioner was appointed to take accounts, and, after he had reported, a final decree was passed awarding the plaintiffs a sum of Rupees 2,759-12-0. Appeal No. 110 is from the final decree and appeal No. 112 from the original decree.

It is necessary to refer briefly to the history of the fund in question. It appears that some time before 1874 the merchants of Kumta started a fund for the benefit of certain charitable and religious institutions by setting aside four annas out of the price of every khandi of goods sold by upcountry people in Kumta. The Gokarn temple was one of the institutions to be benefited, and one-quarter anna, that is one-sixteenth of the fund, was allotted to it. In 1874 there was a meeting of the merchants at which a resolution (Ex. 45) was passed. Some alterations were made in the constitution of the fund and special directions were given in the case of some of the institutions. What was decided in the case of the plaint temple was this. The money collected for it was to be paid to one Venkat Subba Bhagvat who was a nominee of the merchants. He was incidentally the grandfather of the present defendant 3. He was to credit the money to the account of the temple and he was to utilize it for the service of the temple according to the opinion of certain other persons named in the resolution. Then in 1896 another resolution (Ex. 46) was passed. By this time the fund was in the hands of one Jayaram Piraji. The amount he held to the credit of the Gokaran temple was then Rs. 1,292. The directions given in respect of the moneys in his hands were as follows:

> The money should be applied for purposes of hundis, discount, etc., and lending at interest, and thus the amount should be increased. It is to be decided later on in what way these amounts and the amounts that may be recovered in future should be expended.

Then in 1905 a third resolution (Ex. 47) was passed. In this a history of the management of the fund is given. It is stated that there had been certain mismanagement before the appointment of Jairam Piraji and accordingly the duty of making recoveries had been handed over to him. But he having left the city had handed over the money together with his accounts to one Dayal Shet who, it is stated, was not willing to continue the management. It was resolved accordingly that a committee of five persons should be appointed, who should take charge of the money left by Dayal Shet, collect the outstandings due from the merchants and make proper arrangements for increasing the fund. One of the members of this committee was Ramchandra, father of defendant 2. One was defendant 1 himself. Another was the father of defendant 3, and the others appear to have

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been relations of defendants 4 and 5. As far as the evidence in this case goes, there has been no meeting of the general body of merchants in connexion with this fund since that day and no further resolutions have been placed on record.

It is conceded that a trust has been constituted in favour of the temple. The principal defence in the lower Court and the argument on which the appeals have been mainly supported is that the plaintiffs' remedy for breach of the trust, if any, is against the general body of merchants of Kumta who created the fund and are the trustees thereof and not against the defendants who are merely agents of the trustees, i. e., custodians of the fund with duties and powers of investing and lending it, but not of applying it for the purposes of the trust. It is contended that the defendants are responsible not to the plaintiffs, but only to their principals, i. e., to the general body of the merchants. It is, I think, perfectly clear on the one hand that if the fund has been handed over to the defendants in order that they should pay it to the temple or utilize it for the temple, it must be held to have vested in them as trustees for that purpose and the plaintiffs would be entitled to call them to account. On that footing the case would be precisely on all fours with the one in 58 Mad 777 (1). On the other hand if the defendants are merely agents of the trustees and the fund is not vested in them, the *cestuis que trust* have no remedy against them ; they would in that case be accountable to their principals only : Lewin on Trusts, Edn. 13, pp. 203 and 470.

Some support is afforded to the argument of the learned counsel for the appellants by the language used in the resolutions of 1896 and 1905 to which I have referred. It is arguable, I think, that the committee appointed in 1905 was only a managing committee with power to invest, but not to dispose of the fund. But that was a long time ago, and in view of what has happened since, I think it would be impossible to hold that the present committee have no power of disposal. As I have mentioned, one of the defendants is a member of the original committee. The evidence does not show how the others were appointed. There is no reason to suppose, however, that they are not duly appointed to represent the merchants of Kumta in connexion with the fund. All the members are themselves merchants of Kumta and it appears that the fund is now held by them as representing the general body with power to dispose of it and not merely as custodians.

In March 1914 the father of defendant 3 borrowed a sum of Rs. 3,500 from the committee on the security of his land. He executed a mortgage in favour of Ramchandra, father of defendant 2, as representing the committee. At the same time he sold his Mulgeni rights in the land in suit to the father of defendant 2. The price Rs. 2,800 was not paid as he had in his possession money belonging to the fund to that amount. In April 1923, defendant 3 sold the land, which he had mortgaged, to the plaintiffs subject to the mortgage which the plaintiffs undertook to pay off. The land which has been sold to Ramchandra is entered in the Record of Rights in his name. No doubt he is described as a member of the Dharmadav Committee, but there is nothing about this transaction or indeed about any other dealings of the committee with the fund to suggest that they were merely acting as agents of the general body of merchants. In fact the general body has apparently ceased to function for the last thirty years. The defendants' conduct throughout is hardly consistent with the view that they were merely agents without power of disposal of the fund.

But in addition to this, the case set up in the written statement is not really consistent with the case set up in the arguments. The defendants deny in para. 4 of the written statement that they are trustees of the whole of the Dharmadav Fund. They say that the Kumta merchants have appointed independent or separate vahiwatdars to deal with different portions of the fund and they say that they carry on the management and superintendence of the portion of the fund set apart for the plaintiff temple. In para. 8 it is stated :

> A committee has been appointed to make recoveries in respect of some portion of the fund and to dispose of the same and now we defendants 1 to 5 are carrying on the management as members of such a managing committee.

Further in para. 9 it is stated :

1. Abdul Baqi v. Sundararamayya, 1935 Mad 209=156 I C 408=58 Mad 777=68 M L J 136.

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In the arrangement made for this by persons who give money to this charity full power to recover that amount and to make expenses for the rendering of service, etc., that may be thought proper, on behalf of Kumta City, in the temple in suit has been given to the said managing committee. Defendants 1 to 5 who form the committee have full power to dispose of that amount accordingly. But the power of dealing with it does not belong to the plaintiffs.

Reading the written statement as a whole, it seems to me perfectly clear that what the defendants intended to assert was that the plaintiffs as managers of the temple had no right of control over the fund, but not that the defendants had no such power. The contention that the defendants' committee has no power to apply the fund to the uses of the temple or to dispose of it without the orders of the general body of merchants is not really to be found in the written statement at all. Nor does it derive much support from the statements made by defendant 2 when he was examined as a witness. He says:

The owners of this money are the Kumta merchant public represented by us . . . It is our right to determine in what way and for what purposes this money should be utilised. We have to consult the Kumta merchants for that. The Temple Committee have no right in that connexion. It is my opinion that the merchants of Kumta have the absolute right of disposal over the fund through us. We have not consulted the merchants in this respect. . . The suit land was purchased with the funds intended for the plaintiff temple out of the said fund. The fund intended for the plaintiff temple is to be used for the purposes of the plaintiff temple, but for what purposes it should be utilized is yet to be settled. We have not thought over the matter yet . . . We members of the committee have not consulted the Kumta merchants as to what should be done with the money.

Thus the defendant does no doubt say that the general body of merchants has the right to prescribe the manner in which the fund is to be used for the benefit of the temple. He makes it quite clear, however, that the general body is to act through the committee, and his case is really the same as the case made in the written statement, viz., that the plaintiffs have no control over the fund and not that the defendants have not.

Under these circumstances it seems to me that the learned trial Judge has rightly found that the defendants are trustees of the fund. That being so, the plaintiffs are clearly entitled to the trust property in their hands. No cause whatever has been shown against handing it over to them. It may well be that the defendants' committee have the right, after consulting the general body of merchants, if necessary, to prescribe the manner in which the property and the money are to be utilized for the benefit of the temple. There never was anything to prevent the defendants from laying down any conditions they thought necessary. There is no reason to suppose that the plaintiffs would not be willing to abide by any such reasonable directions. But the defendants were obviously not justified in refusing to hand over the property, and as they did refuse to do so, the plaintiffs as beneficiaries undoubtedly had a cause of action against them. A point of limitation has been argued, but on this view of the position of the defendants as trustees, no question of limitation could arise, as S. 10, Lim. Act, would cover the case. On the merits, therefore, the plaintiffs would be entitled to succeed and the appeal would fail. Unfortunately however there is a serious preliminary difficulty arising under S. 92, Civil P. C. This is a case of an alleged breach of a trust created for public purposes of a religious nature and one of the reliefs prayed for in the suit, namely the taking of accounts, is a relief of the kind specified in S. 92. Sub-s. (2) of the section provides that save as provided by the Religious Endowments Act, 1863, (which does not affect the present case), no suit claiming any of the reliefs specified in sub-s. (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section. The institution of this suit, therefore, required the previous sanction of the Collector under S. 93 and that sanction has not been obtained. This point was not taken in the trial Court. It was not even mentioned in the memorandum of appeal. But, as it appears on the face of the record that there has been a breach of a statutory requirement, we felt that we could not refuse to allow the point to be taken and argued.

Mr. Murdeshwar who appears for the respondents has frankly conceded that in view of the authorities 58 Mad 988 (2) and 26 Bom L R 950 (3) the objection is

2. Janaki Bai v. T. Vinayakar, 1935 Mad 825=157 I C 63=58 Mad 988=69 M L J 291 (F B).
3. Narayan v. Vasudeo, 1924 Bom 518=86 I C 490=26 Bom L R 950.

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valid, that is to say, it is a suit covered by S. 92, in its present form, and it has not been instituted in accordance with that section. The learned advocate sought to get out of the difficulty by suggesting that the plaint might be allowed to be amended by abandoning the claim for taking accounts. If there had been no prayer for this relief, he says, there would have been no objection on account of S. 92 and the plaintiffs would have been able to obtain practically the same relief as they have been awarded. At any rate they could have recovered the land and such moneys as are in the hands of the defendants to the credit of the fund. But there are obvious difficulties in the way of this proposal. Having regard to the frame of the plaint the prayer for an account could not be regarded as mere surplusage. Moreover, a Commissioner was appointed to take accounts and accounts have actually been taken. Then again what sub-s. (2), S. 92 says is that no suit shall be instituted claiming any of the reliefs specified in the first part of the section. In my view that must mean that the question whether S. 92 has to be applied must depend upon the prayers in the plaint at the date when the suit was instituted, and the provisions of the section cannot be evaded by an amendment of the plaint at a later date. There is authority for that view in 32 Bom L R 1435 (4): see especially the judgment of Blackwell, J. at p. 1446. As far as I can see, there is no means of getting over the difficulty created by S. 92 and the appellants therefore must succeed, in spite of the fact that the objection was taken at a very late stage. The result is unfortunate.

On the merits of the dispute we are by no means satisfied with the attitude taken up by the defendants. The plaintiffs are undoubtedly entitled to the fund and the property purchased out of it subject to any conditions as to the use of it which might be reasonably imposed. The defendants ought to have seen the reasonableness of the plaintiffs' claim, and if any further authority from the general body of merchants is required, they should have taken steps to obtain it. They must be held responsible, or at any rate very largely responsible, for this litigation which should not have been necessary at all. For these reasons, I think, we must allow the appeals, set aside the decrees of the lower Court and dismiss the suit. We direct, however, that the parties will pay their own costs throughout. Cross-objections also dismissed.

4. Narsidas v. Ravishankar, 1931 Bom 33=128 I C 891=32 Bom L R 1435.

Tyabji, J.—I agree with the orders proposed. The ultimate difficulty in the way of the decrees appealed against being confirmed is S. 92, Civil P. C., Mr. Murdeshwar admitted that S. 92 was fatal to the suit as framed; but suggested the difficulty might be got over by an amendment of the plaint, and applied for permission to amend : so that the prayer for accounts (which brings the case under S. 92) may be struck off. When, however, the plaint is examined, this course appears wholly impracticable. The very basis of the plaint is an account of the sums collected in respect of the fund in question. It is only after an account is taken, that it is possible to deal with the prayer that the defendants be ordered to hand the fund over to the plaintiffs. The accounts are necessary to determine how much is claimed. Unless an account is taken, the basis of the decree that the plaintiffs seek cannot be determined. The plaintiffs cannot say what sums represent the funds or give any other particulars of them. It is true that a claim is made with respect to certain properties mentioned in the plaint. But these properties are stated to represent a part of the sum to which the plaintiffs can lay claim only on the basis of the account. Referring to the plaint, the origin and basis of the claim is stated in para. 2. Shortly it is "that the people of Kumta determined to recover fixed amounts as Dharmadav and the practice of making recoveries has continued accordingly for a long period." Para. 3 refers to the amount being credited and accounts thereof being maintained and defendants 1 to 5 being appointed trustees for the purpose of keeping these accounts. Out of the accumulation of the fund so collected, of which no other particulars are given in the plaint, certain properties are stated in para. 5 to be purchased. "Therefore the cause of action"—so para. 7 runs,

for this suit brought for the purpose of obtaining possession of the lands in suit and for obtaining the amount of the said charity fund and the amount of the income of the lands in suit payable after getting the same ascertained

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by making an account from the beginning, arose from 11th August 1928.

The prayers are, first, that the contentions of defendants 1 to 5 may be set aside and thereafter possession of the said lands awarded to the plaintiffs ; secondly, that true accounts from the beginning of the said charity should be ordered and the amount found payable under account in respect of the fund and the amount that may be found payable under the account after taking the account in respect of the income up to this day, of the lands in suit from defendants 1 to 5, may be awarded. In my opinion, therefore, if the plaint were amended by striking off the prayers for the account, nothing would be left after making the consequential amendments. For this reason in spite of the grounds which appear from my learned brother's judgment inclining us to assist the plaintiffs in obtaining the relief that they claim, the application for amendment of the plaint cannot be allowed.

In connexion with the application for amendment of the plaint two decisions were cited. In 55 I A 96 (5) the question was whether a point was res judicata—whether the compromise decree in a previous suit precluded the later suit. That question depended upon whether the compromise decree in the previous suit was a decree in a representative suit, (i. e , whether the previous suit was a suit under S. 92) and was binding upon that section of the public which was represented by the plaintiff in that suit, and therefore (by virtue of Expln. 6 of S. 11 of the Code) binding upon the plaintiffs in the later suit. The previous suit had been instituted under the provisions of S. 92 with the sanction of the Advocate-General " and therefore became a representative suit". But subsequently new defendants and new prayers had been added by amendment of the plaint, and Lord Sinha in delivering the judgment of the Privy Council said (p. 106):

> Their Lordships consider that, in so far as the nature of the suit was changed by the amendments mentioned, namely, by adding strangers to the trust as defendants and by prayers for relief not covered by S. 92, the suit ceased to be one of a representative character and the decree based on the compromise such as it was, namely, by six only out of the seven plaintiffs in the suit, however binding as against the consenting parties, cannot bind the rest of the public. S. 11, expln. 6, has no application to such a case.

The decision therefore was (1) that a decree in a suit originally brought under S. 92 could not be considered as a decree in such a suit, in so far as the nature of the suit had been changed prior to the decree being obtained; and (2) that the nature of the suit had been changed in so far that by amendments of the plaint, strangers had been added as defendants and prayers introduced for relief not covered by S. 92. It was argued before us that the nature of the suit might similarly be changed by amendments so as to take away from the suit that which offends S. 92 ; so that a suit which as originally instituted is obnoxious to S. 92 might, by amendments in the plaint, be altered and might be rendered not obnoxious to S. 92. It was argued, on the other hand, that such an amendment could not be allowed in view of the decision in 32 Bom L R 1435 (4).

In my opinion, this decision does not refer to the question we have to consider. In the case cited, Mirza, J. in the Court of first instance had answered the first issue to the effect that the suit as framed was maintainable, that the reliefs were not those referred to in S. 92, and that therefore it was not necessary to comply with the provisions of that section. But the Court of appeal held the suit to be for reliefs specified in S. 92 and therefore that compliance with that section was necessary. Thereafter in the Court of appeal it was relied upon (in answer to the objection of failure to comply with S. 92) that at a late stage of the hearing before Mirza, J. two of the prayers had been abandoned on behalf of the plaintiffs. The argument in the Court of appeal was that the two prayers that had been so abandoned were the only prayers for reliefs mentioned in S. 92, and that therefore after those prayers had been abandoned the suit must be treated as not falling under the terms of S. 92 (2) but that after the abandonment of these prayers the suit must be held to be maintainable just as if the plaint had not contained the prayers that had been abandoned. This argument was rejected. Blackwell, J. emphasized that S. 92 precludes the institution of a suit claiming the specified relief. The terms of S. 92 are not that [unless the suit is in conformity with the provisions of S. 92,

5. Abdur Rahim v. Mahomed Barkat Ali, 1928 P C 16 = 108 I C 361 = 55 I A 96 = 55 Cal 519 (P C).

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sub-s. (2)] none of the reliefs specified in sub-s. (1), S. 92 shall be granted in a suit instituted in respect of any such trust as is mentioned in S. 92. The argument that was rejected required the sub-section to be read as if it ran "where a suit is instituted in respect of any such trust except in conformity with sub-s. (1), to S. 92, no reliefs specified in sub-s. (1), shall be granted." That is not how S. 92 is worded. The decision does not go beyond that.

It does not deal with the question which is before us: the question that arises when an application is made that the plaint should be allowed to be amended in a particular manner. The reasons for the application to be allowed to amend may be that the suit as instituted is found to be obnoxious to S. 92; and it may be part of the argument in the application that if the plaint is amended, it may be considered for the purpose of S. 92 as if it had been filed in the amended form. That question was not considered and was not before the Court in 32 Bom L R 1435 (4). The application for permission to amend in the present plaint cannot in this case be allowed, the reason shortly being that the whole suit would fall to the ground if the amendments were allowed. That of course is not the only reason why an application to amend the plaint may be refused. The Court considers, amongst other matters, the stage at which the application is made, the nature of the suit, the effect that would result from the amendment and the terms on which the amendment might or might not be permitted. If there had been no such initial difficulty in permitting an amendment as I have found in this case, it might have been necessary to consider whether the decision of the Privy Council helps the argument, addressed to us in favour of amendment, viz., that since the Privy Council held that the nature of the suit before them had been changed so that the suit did not, to the extent of the amendment, remain a representative suit, so also the present suit would after the amendments be considered no more to remain a suit claiming the specified reliefs but would be turned into a suit which need not have been instituted in conformity with S. 92; that, if by amendment the suit may lose its efficacy as a suit under S. 92, then by amendment it may lose the necessity for conforming with S. 92. I am only stating the argument, not expressing any opinion on it. The initial difficulty in the way of the amendment makes it unnecessary to consider this argument. The decision relied upon, viz. *Narsidas* v. *Ravishankar* (4), was not dealing with any application for amendment. I agree with the orders proposed by my learned brother.

R.W./R.K. *Appeals allowed.*

A. I. R. 1936 Bombay 418

RANGNEKAR, J.

Bundi Portland Cement, Ltd.—Plaintiffs.

v.

Abdul Hussein Essaji—Defendant.

O. C. J. Suit No. 649 of 1931, Decided on 9th December 1935.

(a) Trade Mark—Infringement—Colourable imitation—Passing off action—Fraudulent intention not necessary—Likelihood of public being deceived is sufficient—Presumption that a man intends the natural and ordinary consequences of his act applies to passing off action.

In a passing off action the plaintiff has to prove that the conduct of the defendant is such as is likely to pass off the defendant's goods as his. Fraudulent intention is not necessary. It is sufficient to prove that the practice complained of is of such a nature that it is likely in the ordinary course of business to deceive the public. [P 419 C 2]

In deciding the question, whether the get-up adopted with regard to the goods is such a colourable imitation, that it is likely to deceive the public, it should be found out on the face of the goods sold by, or belonging to the defendant and having regard to the surrounding circumstances that it is likely to deceive a casual unwary purchaser into the belief that in really buying the goods of the defendant he is really buying the goods of the plaintiff. The ordinary presumption that a man intends the natural and ordinary consequences of his act is applied to passing off action: *A. G. Spalding & Bros.* v. *A. W. Gamage, Ltd.*; (1915) 32 *R P C* 234 and *Singer Manufacturing Co.* v. *Loog*, (1882) 8 *A C* 15, *Rel. on.* [P 421 C 1, 2]

(b) Civil P. C. (1908), O. 29, R. 1 and O. 6, Rr. 14 and 15—Plaint by incorporated company — Defective verification by principal officer — De facto secretary is principal officer.

The rule in O. 29 is clearly permissive and not imperative in its terms, and it lays down mere procedure. The rule, however, does not exclude the operation of the provisions of O. 6, Rr. 14 and 15. In the case of ordinary pleadings if the signature on the plaint or verification of the pleading is defective, the defect can be cured at a subsequent time. There is nothing in the Code which requires a particular course to be followed by the person who verifies the plaint. All that is required is that the plaint should be

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verified by a principal officer and he should be able to depose to the facts of the case. A de facto secretary of a firm who verifies a plaint in the absence of the secretary is a principal officer: 1930 *Bom* 566, *Rel. on.* [P 420 C 1, 2]

K. McI. Kemp and *Lalji Gokuldas*—for Plaintiffs.

M. L. Maneksha and *H. D. Banaji*—for Defendant.

Judgment.—The plaintiffs are an incorporated company registered in Bombay under the Companies Act of 1882. The defendant is a merchant carrying on business in Bombay. The plaintiffs manufactured cement, and it is sold in Bombay and other Indian markets in bags bearing three letters "B B B" on them with the word "Portland" above such letters and the word "Cement" below them. The plaintiffs' cement is well known in the market as the "B B B" brand, or the 'tin B' or 'tun B' brand, and with this trade mark their cement has attained a high reputation and commands a large sale all over India, and their despatches from the works during the five years have averaged over 18 lacs of bags per annum. About the beginning of the year 1931 the plaintiffs came to know that the defendant was importing into Bombay and selling large quantities of Japanese cement in bags bearing the letters "R R R" with the word "Portland" above such letters and the word "Cement" below the same, which words according to the plaintiffs are similar to the words used on the plaintiffs' bags. They learnt that two consignments, each of a 1000 bags of Japanese cement bearing the letters "R R R," had been imported by the defendant. The plaintiffs, therefore, say that the get-up of the defendant's bags, and more particularly the letters "R R R" placed between the words "Portland" and "Cement" are a colourable imitation of the plaintiffs' bags and trade mark calculated to deceive a purchaser into the belief that in purchasing the defendant's cement he is purchasing the cement of the plaintiffs.

The defendant denies that the bags in which he was importing and had imported cement were similar to the plaintiffs' bags, and says that there were many points of dissimilarities. He denies that the get-up of his bags is a colourable imitation of the plaintiffs' bags or trade mark or that it is calculated to deceive a purchaser into the belief that in purchasing the defendant's cement he is purchasing the cement of the plaintiffs. The defendant, by his written statement, points out various differences in the bags which, he contends, clearly distinguish his goods from those of the plaintiffs. The defendant then counterclaims for a sum of Rs. 57,460 for damages alleged to have been sustained by him by reason of the goods having been detained by the Customs Authorities at the instance of the plaintiffs. In the plaint as framed the plaintiffs in para. 6, allege that the defendant was in fact wrongfully passing off his goods as those of the plaintiffs by selling his Japanese cement with the marks and get-up used by the plaintiffs. This was denied by the defendant, and this case has now been given up by the plaintiffs. This then is a passing off action. The basis of it being injurious falsehood or a false representation by the defendant, it must be proved as a fact that the false representation was made. The principle is well put up by Parker, L. J. in 32 R P C 234 (1), in these words (p. 234):

> The false representation may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare. The more common case is, where the representation is implied in the use or imitation of a mark, trade name, or get-up with which the goods of another are associated in the minds of the public, or of a particular class of the public. In such cases the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be the goods of the plaintiff, or the goods of the plaintiff of a particular class or quality, or, as it is sometimes put, whether the defendant's use of such mark, name, or get-up, is calculated to deceive.

What the plaintiff has to prove in such a case is, in my opinion, that the conduct of the defendant is such as is calculated, that is to say likely, to pass off the defendant's goods as his. Fraudulent intention is not necessary. It is sufficient to prove that the practice complained of is of such a nature that it is likely in the ordinary course of business to deceive the public. In considering whether deception is probable or not, account has to be taken, as Lord Selbourne, L. C. observes in (1882) 8 A C 15 (2), not of expert purchasers but of the ordinary ignorant and unwary member of the public. The question really

1. A. G. Spalding & Bros. v. A. W. Gamage, Ltd., (1915) 32 R P C 234.
2. Singer Manufacturing Company v. Loog, (1882) 8 A C 15=18 Ch D 395.

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is, whether the defendant has or has not knowingly put into the hands of retail dealers the means of deceiving the ultimate purchasers: (1896) A C 199 (3). Where, therefore, there is anything so characteristic in the get-up or appearance of the defendant's goods that it identifies those goods as the merchandise of the plaintiff, any deceptive adoption or imitation of that get-up or appearance or mark is enough. These principles, I think, are well established. I have referred to the plaintiffs' case set out in para. 3 of their plaint. That was expressly denied by the defendant by his written statement, but no issue on that question was raised by the learned counsel on behalf of the defendant, and that contention has now been given up by him. I must, therefore, assume that the facts which the plaintiffs have stated in para. 3 of their plaint are proved and admitted by the defendant. The only question then is, whether the get-up adopted by the defendant with regard to his goods is such a colourable imitation of that of the plaintiffs that it is likely to deceive the public. It is common ground that the words "Portland Cement" are commonly used to describe cement in the Indian market, and that it is sold in bags which are more or less similar. Before dealing with the facts of the case, it would be convenient to dispose of one preliminary point raised by the defendant. He contends that the plaint is not properly declared, and that the suit should be dismissed. This contention is based on the provisions of O. 29, Civil P. C., which by R. 1 requires that:

> In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

The plaint in this case was declared by the witness Paton, who describes himself in the verification clause as one of the principal officers of the plaintiffs' company. Now, it is argued that Mr. Paton is not a principal officer of the plaintiffs' company who is able to depose to the facts of the case.

The rule in O. 29 is, in my opinion, clearly permissive and not imperative in its terms, and it lays down mere procedure. The rule, however, does not exclude the operation of the provisions of O. 6, R. 14 and R. 15, Civil P. C., and there can be no doubt now that in the case of ordinary pleadings if the signature on the plaint or the verification of the pleading is defective, the defect can be cured at any subsequent time. O. 6, R. 15, says inter alia that a plaint may be verified by some person proved to the satisfaction of the Court to be acquainted with the facts of the case. In 55 Bom 151 (4) it was pointed out that the provisions of O. 29, R. 1, are merely permissive and are subject to the provisions of O. 6, R. 14. A similar view has been expressed by the Lahore, Madras and Allahabad High Courts. The precise point has not been decided by the Calcutta High Court.

Apart from this, in my opinion, the facts in this case clearly show that the plaint was properly verified. It is undoubtedly true, as urged by the defendant's counsel, that Mr. Paton in the witness-box admitted that he was an employee of Messrs. Killick Nixon & Co., who are the managing agents of the plaintiffs; but the evidence which I have before me of the articles of association read with the agency agreement and the power-of-attorney executed in favour of Mr. Paton by Messrs. Killick Nixon & Co. clearly shows that his salary really came from the company, and that he was an employee of the company. Apart from that, I have the evidence of Mr. Paton before me, which I accept, which shows that at or about the time the suit was instituted there was no secretary of the plaintiffs, and he was working as their secretary, that is to say he was a de facto secretary of the plaintiffs. That certainly would make him a principal officer of the plaintiffs.

Then the only other question is, whether he is able to depose to the material facts of the case. Now, although the defendant contends that the plaint was not properly verified, he has not set out any particulars on which he bases the objection; but in his arguments the defendant's counsel contended that in order to satisfy the provisions of O. 29, R. 1, it was necessary for the plaintiffs to state, in the body of the plaint or by an affidavit, that the person who was verifying was a principal officer of the plaintiffs able to depose to the facts of the case,

3. Reddaway v. Banham, (1896) A C 199=65 L J Q B 381=74 L T 289=44 W R 638.

4. Calico Printers' Association, Ltd., v. Karim & Bros., 1930 Bom 566 = 128 I C 557 = 32 Bom L R 1305=55 Bom 151.

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and for this purpose reliance was placed on a decision of the Calcutta High Court, according to which the practice there requires either of these courses to be taken. In my opinion, there is not the slightest warrant for this practice. There is nothing in the Code which requires any of these courses to be followed by the person who verifies the plaint. All that the law requires is that the plaint should be verified by a principal officer and he should be able to depose to the facts of the case. It is open to the defendant to object to the verification as insufficient and to show that the person who has verified is not a principal officer, or if he is a principal officer, he is not able to depose to the facts of the case either by cross-examination or otherwise. That has not been done in this case, and I have no reason to disbelieve the evidence of Mr. Paton when he says that at the time when the suit was instituted there was no man in the company better acquainted with the facts of this case than himself, and better able to depose to them. Then the defendant's counsel says that it was not necessary to cross-examine Mr. Paton because the verification clause itself shows that he is not familiar with the facts of the case. I entirely reject that contention, as the facts have been verified by Mr. Paton and have been found to be true to his own knowledge.

I must, therefore, reject the contention and hold that the plaint was properly verified. (After discussing certain questions of fact arising in the case, the judgment proceeded.) As I have said, the real question is the conduct of the defendant which is to be examined and which the plaintiffs have to prove. The Court has to find that the get-up is a colourable imitation on the face of the goods sold by, or belonging to, the defendant, and having regard to the surrounding circumstances it is such a colourable imitation that it is likely to deceive a casual unwary purchaser into the belief that in buying the defendant's goods he is really buying the goods of the plaintiffs. It is not necessary in cases of this kind to show that there was any intention to deceive as a matter of fact as Mr. Maneksha argues. It is not necessary to prove that the defendant not only had the intention to deceive but was actually deceiving his customers. I am unable to see why the ordinary presumption, that a man intends the natural and ordinary consequences of his act, cannot apply to passing-off actions. If mere comparison is not sufficient, then the plaintiffs must prove that what may be apparently innocent is really calculated to deceive. In such cases motive becomes material, and the Court may well assume that if a man is fraudulent, the steps which he himself thought sufficient would be likely to achieve his object. It has been held that imperfection in mode of marking so as to more closely resemble the plaintiffs' mark, or the removal of one or two points of difference which originally served to distinguish the defendant's goods from those of the plaintiffs, the adoption of an essential part of the plaintiffs' mark with a trifling and colourable alteration, the placing word on the same spot, small type for a word showing that the article was not of the plaintiffs, and imitation of barrels or bags, are all cases in which the Court has held that there was the intention to deceive, and such devices were adopted with fraudulent intent: see cases in foot-note (c), p. 137, Sebastian on Trade Mark. (His Lordship then referred to the evidence and proceeded.) Having regard to these facts, it is not difficult for me to hold that the defendant, having found that he was making a loss on the goods which he had sold with a mark which would clearly be distinguishable from the plaintiffs', had formed a deliberrate intention of imitating the plaintiffs' marks and set about it systematically to achieve his object. It is not for nothing that all the other manufacturers of brands, as appears from Ex. G, adopted quite characteristically different marks or get-up so as to distinguish their bags from those of the plaintiffs; but not so the defendant.

The letters "B B B," denoting the plaintiffs' mark, stand out prominently and the whole get-up of the plaintiffs' goods coupled with the size and position of the three letters is not only characteristic but unique. It is clear law that nobody has a monopoly of the English alphabet or of the vocabulary; but in adopting letters or words which have come in the market to be identified with the goods of the plaintiffs, one has to be careful to see that in adopting the same letters or words, there is some distinguishing feature which would clearly distinguish one's goods from those of the plaintiffs, and the

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question now remains if there are any distinguishing features in regard to the defendant's goods which would save him from the charge which prima facie has been established against him by the evidence before me. Mr. Maneksha therefore very properly emphasized the so-called points of dissimilarity. These differences are set out in the written statement, and an attempt is made to support them by the evidence of the merchant and the broker. Now, as a matter of law, it is not necessary for the plaintiff to prove that the imitation is so similar and so close that there is hardly any difference noticeable between his goods and those of the defendant. Cases of exact imitation are very very rare. In most of these cases the question which the Court has to consider is, whether, having regard to all the surrounding circumstances, the get-up was of such a nature as was likely to deceive people in the ordinary course of business into the belief that they were buying the plaintiffs' goods, and that in fact the defendant's goods were being passed off to him.

I may at once say that I do not attach the slightest importance to the minor characteristics. It would be absurd to suppose that a casual purchaser—or, for the matter of that, even a more careful purchaser—would look at the manner in which the bags are sewn or tied up, or that the colour of the contents of the bags differs. These little differences do not, in my opinion, affect the question which I have to decide. I may however briefly notice the points of difference stressed by the defendant's counsel. The first is about the colour. According to Ghulam Husein Gegabhai, the merchant examined on behalf of the defendant, Japanese cement is rather blackish in colour while Indian cement is pale green. The witness however admitted that he did not know if Indian cement varies in colour. Apart from that, the sale by the defendant is by bags and that by the witness is also by bags as he is a wholesale dealer himself. Excepting 10 per cent of the total sales, the sale by the plaintiffs is also by bags, 50 per cent consisting of very large consignments. It is hardly likely that merchants would notice or buy by colour rather than by marks. The broker started by saying that Indian cement differs in colour from Japanese but had to admit that he had never seen the colour of any cement. No attempt was made by the defendant to show that the colour was different. The next point is about the difference in the sewing of the bags. The difference is hardly noticeable, unless one's attention is specifically and minutely drawn to it. Then it was said next that the bags of the plaintiffs were tied at the top with a copper wire and the Japanese bags with iron wire. The remark I have made as to the sewing will apply to this point also, particularly as Gegabhai admits that the thickness of the wire in both cases is the same. The next point is about the difference in price, the plaintiffs' cement being sold at a higher price. The merchants and importers may perhaps notice the difference, but the consumers, particularly up-country ones, would be glad to get the same goods cheaper, and this would, if anything, help the defendant's goods being palmed off more easily and more widely.

Then there remain two more points of dissimilarity which are stressed on behalf of the defendant. The first relates to the words "Made in Japan" stamped on the defendant's bag below the word "Cement," and the second is the Japanese maker's mark and some Japanese words in a circle on one side of the bags. It is said that in the market cement is known or described by the country of its origin or manufacture, e. g., as Japanese or Indian or foreign, etc., and purchasers ask for, say, either Japanese or Indian, etc., cement, and for this purpose reliance is placed on the evidence of the merchant Gegabhai and that of the broker. I am not impressed with this evidence. Gegabhai admits that when he sells the B. B. B. cement, he writes on the memos not Indian but "B. B. B. cement." He further admits that he never described in the memos Indian cement sold by him as "Indian cement" but only describes the mark. He cannot say whether he bought Japanese cement from the defendant containing his previous marks. He asserted that on bags of Indian cement, the words "Made in India" are painted, but had to admit that it was not so. Moreover he had to admit that there is nothing in the memos produced or in the account books to show that Indian cement was sold as "Indian cement," and not by the marks concerned; and the attempt of the defendant in re-examination by the production of three sign-boards that three kinds of

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Indian cement are described as "Indian cement" does not carry the case any further.

As to the broker, the entries in his diary show that he effected sales of cement under the description "Japan cement or bags." In my opinion, the whole of this evidence is entirely worthless. As I have already stated, the defendant now admits that the plaintiffs' mark is well known in the market as "B. B. B." or "*Tin* B" or "*Tun* B," which means that their goods are sold on the market under this mark of theirs. The question therefore whether their cement is sold as Indian cement does not arise. Apart from that the merchant Gegabhai and the broker and even the defendant are wholesale dealers and their experience is confined to wholesale transactions in which merchants dealing with each other may demand, if they want Japanese, "Japanese cement," or, if they want Indian, "Indian cement," and describe the particular kind of cement they want by the country of its origin. This does not affect the real question. It is the larger public, not the public so much in Bombay, but the up-country public, and particularly the ultimate purchasers, with whom the plaintiffs have to deal, and neither of these two witnesses has said that even in regard to small transactions or sales, the purchaser would ask for a particular kind of cement by describing the place of its manufacture and not by the brand by which it is known in the market.

Then the words "Made in Japan" are in such small type that they would not ordinarily attract the attention of casual purchasers; and if the bags are put together, I have not the least doubt that these words will to a large extent be undistinguishable, if not invisible. The remarks which I have made with regard to the words "Made in Japan" also would apply to the Japanese mark, because it is after all the mark in large letters which would attract the attention of the purchaser rather than the signs or badges which may be on one side of the defendant's bags, and which would ordinarily escape attention. Under the Sea Customs Act, bags imported from foreign countries have to show the origin of manafacture and the defendant is simply trying to take advantage of this circumstance.

I may now refer to another attempt of the defendant to show his bona fides. He says that the letters R. R. R. are the first letters of three names of God, namely, Rab, Rehman and Rahim. They are the second, third and fourth names of God out of about 100 names of God in all. The initials of these 100 names exhaust practically the whole of the English alphabet and the defendant could have got any letter out of the first letters of the names except the letter X. There is no explanation why he should have chosen the three names beginning with R rather than any others. As I have remarked the letters R R R are the three nearest letters to B. B. B. in point of appearance, and it seems to me that the defendant deliberately chose these as being nearest to B. B. B. It is significant that the idea of religion did not appeal to him when he started importing cement from Japan, and at one time he even adopted his own initials though he says that the letter B in A E B represents the name of God. From what I have seen of the defendant's son in the witness-box I have no hesitation in rejecting his evidence.

Having regard to these facts, I must hold that the get-up of the defendant's goods is a colourable imitation of the plaintiffs' goods and that the plaintiffs are entitled to succeed. (After discussing the remaining points, His Lordship concluded.) In the result there will be a decree in favour of the plaintiffs restraining the defendant and his agents and servants from importing and selling cement in bags with the mark "R R R" or any other mark so designed as to be a colourable imitation of the plaintiffs' mark. The other prayers have not been pressed. The defendant to pay the costs of the suit. Counterclaim dismissed with costs.

P.R./R.K. *Suit decreed.*

A. I. R. 1936 Bombay 423

RANGNEKAR, J.

Kissondas Premchand—Plaintiff.

v.

Jivatlal Pratapshi & Co.—Defendants.

O. C. J. Suit No. 1700 of 1931, Decided on 20th December 1935.

(a) Administration—Decree passed—Assets distributed — Creditor filing suit claiming re-distribution—Nature of claim is equitable —If laches are proved, relief cannot be granted.

After an administration decree was passed for the administration of the estates of a deceased

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person and assets were distributed, a creditor came forth and filed a suit claiming that there should be a re-distribution of the assets because he was a creditor of the deceased and entitled to get his share of assets :

Held : there was no statutory law which he could invoke. All that he could say was that by analogy of certain provisions under the Succession Act, he was entitled to have a rateable distribution and a refund from the creditors who had been paid under the administration decree. But such a claim being purely an equitable claim in its nature and the relief claimed also equitable, the Court would reject a claim of this nature if claimant be guilty of laches, negligence or gross delay. [P 428 C 1]

(b) Laches—Effect of, on equitable.

Delay in seeking an equitable remedy is technically called 'laches' and it will disentitle a claimant to come in and establish his claim, even though that claim is not disputed : *Smith* v. *Clay*, (1767) 3 *Bro C C* 646 and *Sawyer* v. *Birchmore*, (1836) 1 *Keen* 391, *Ref.* [P 428 C 1, 2]

(c) Debtor and Creditor — Limitation—Institution of administration suit—Limitation does not stop running against creditor who is not party to that suit.

Mere institution of a suit by a creditor for himself and other creditors for the administration of the estate of the deceased debtor would not save limitation in favour of an individual creditor who is not in fact a party to the suit and who is not the plaintiff. [P 429 C 1]

(d) Administration — Suit for — Question between parties — Possibility of determination—Court is not bound to make order for administration.

The Court is not bound to make an order for the administration of the estate if the questions between the parties can be properly determined without such order. The order may be refused, even if the testator has directed his executors to take proceedings to have his estate administered by the Court : *Jones* v. *Blake*, (1885) 29 *Ch D* 913 and *Jones* v. *Hawkins*, (1888) 38 *Ch D* 319, *Rel. on*; *Sterndale* v. *Hankinson*, (1827) 1 *Sim* 393, *Held impliedly overruled by Bray* v. *Tofield*, (1881) 18 *Ch D* 551. [P 429 C 2]

(e) Civil P. C. (1908), O. 1, R. 8—Representative suit — Leave of Court is essential—Persons represented can apply to be made parties—But Court cannot compel plaintiff to add such persons as co-plaintiffs.

Under O. 1, R. 8 a representative suit is never allowed to be instituted except with the leave of the Court. Sub-cl. (2) undoubtedly contemplates that a person on whose behalf or for whose benefit a suit is instituted may apply to the Court to be made a party to such suit. But it is clear that the Court will not compel the plaintiff to add the persons on whose behalf he sues as co-plaintiffs : 34 *Bom* 420, *Rel. on*; *Sterndale* v. *Hankinson*, (1827) 1 *Sim* 393, *Dissent.* [P 431 C 2]

(f) Succession Act (1925), S. 323—S. 323 lays down rule of procedure to be followed by executor or administrator—Creditor obtaining decree against estate of deceased person—Execution against estate in legal representative's hand—S. 323 not applicable.

Section 323 merely lays down a rule of procedure that must be followed by an executor or administrator. It is clearly not applicable when a creditor who has obtained a judgment and decree against the estate of a deceased person applies to execute the decree against the estate in the hands of the legal representative of the deceased : 6 *L B R* 158, *Rel. on.* [P 434 C 1]

Jamshed Kanga, J. H. Vakeel and *R. S. Bilimoria*—for Plaintiff.

Lalji Gokaldas, M. C. Setalvad, V. F. Taraporewala, Murzban Mistree, K. M. Vakil, H. B. Sonpal and *M. M. Thakore*—for Defendants.

Rangnekar, J.—This is an action the like of which I have never heard of and in support of which no precedent can be or has been produced. Counsel in the case tell me that one of the questions raised by it has not yet come up for decision in any court. The claim in the suit is for a redistribution of the fund paid over by the Court to the creditors of a deceased person whose estate was under its administration, and it is made by one creditor who has not received his rateable share in the distribution of the fund against the other creditors. The plaintiff was carrying on business in Bombay till 1927. He had entered into various transactions for the sale and purchase of cotton for April-May-December 1926 and January 1927, vaidas with one Noorani in Bombay. Noorani committed suicide on or about 8th October 1926. At the time of his death he was indebted to the plaintiff, as a result of the transactions, in the sum of Rs. 18,762-3-6. Three days after Noorani's death, defendants 1, in this suit brought an action on behalf of themselves and all other creditors for the administration of his estate against his son under the provisions of O. 1, R. 8, Civil P. C. The usual notices, as required by law, were published which, the plaintiff alleges, never came to his knowledge. On 6th March 1930, there was a decretal order of reference, which inter alia directed the Commissioner of this Court to take an account of the debts due by Noorani. In pursuance of this order, the Commissioner invited claims against the estate of Noorani. A notice for this purpose was published in the Bombay Samachar of 1st July 1930, and in the Times of India on 2nd July 1930. The plaintiff says that this notice, too, never came to his knowledge.

The Commissioner made his report on 4th September 1930. On 6th October 1930,

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he was directed to investigate some further claims which came in, which he did, and made a further report on 5th November 1930. On 10th November 1930, a decree was made confirming the two reports, which inter alia declared that defendants 1 to 7 in this suit were the only creditors of Noorani for the amounts mentioned against their names in Sch. 1 to the decree and directed the Commissioner to make a rateable distribution among these creditors, except defendant 7, as the assets left by Noorani were insufficient for a full payment, and as to defendant 7 it was provided by the decree that Mr. Moos, who was the receiver appointed in the suit, should retain a sum of Rs. 7,500 in order to meet the claims of defendant 7 in this suit, who meanwhile had filed a suit for the recovery of his debt.

Accordingly, on 7th March 1931, the Court Receiver, Mr. Wadia, who by subsequent orders of the Court was substituted in place of Mr. Moos, paid a dividend of 12 annas in the rupee of the amounts mentioned in the schedule to the said decree to defendants 1 to 6 in this suit; and on 23rd July 1931, he satisfied the claim of defendant 7 out of the sum of Rs. 7,500, which, as stated above, had been retained for him. The plaintiff alleges that he had no knowledge of the decree at the time it was passed and came to know of it in March 1931. He says he immediately caused his attorneys to write to defendant 8, who is the Court Receiver, not to distribute the moneys in his hand, to which the receiver replied that he was bound to carry out the orders of the Court. By his attorneys' letter dated 6th March 1931, the plaintiff requested the receiver not to proceed with the distribution so as to give an opportunity to the plaintiff to establish his claim. This letter, as the record shows, was received in the receiver's office by the 1st assistant to the receiver on the same day. He thereupon made an endorsement on the letter asking the assistant who attended to this matter to note the request of the plaintiff and to inform all the parties of it. In spite of this, the receiver made the payment on 7th March 1931, as no order from the Court had been obtained restraining him from carrying out the earlier orders of the Court. The receiver made an endorsement at the foot of this letter in these terms: "Received by me on 9th March, at 11-50 a. m." and initialled it. In my opinion, this endorsement is entirely unmeaning and unnecessary. The letter having been received by the receiver in his office on 6th March, it was absurd to say that the receiver received it on the 9th. Even if he had made no such endorsement on the letter, he would have been perfectly justified in proceeding to distribute the moneys in his hands as the plaintiff had taken no steps to obtain an order from the Court restraining him from so doing. It was open to the receiver, after the receipt of the letter of 6th March, to stay his hands in his discretion; but he was not bound to do so, and he would have been perfectly safe even if he had proceeded to distribute the fund in spite of the plaintiff's letter without making an absurd endorsement of this nature on the letter. I need not pursue the matter further, as the conduct of the receiver does not in the slightest degree make any difference to the questions which I have to determine in this case.

This suit was filed on 9th September 1931. It appears that, prior to the institution of this suit, defendants 9 in the present suit took out a chamber summons in the administration suit for an order that the suit should be referred back to the Commissioner to investigate their claim against the estate of Noorani and to make a further report. This summons was, by an order made on 2nd March 1931, adjourned into Court. Meanwhile, the plaintiff, after the institution of his suit, took out a notice of motion on 17th November 1931, for an injunction restraining the receiver from making any further payments out of the moneys in his hands and the creditors receiving any portion of their claim. The plaintiff alleges that in spite of this notice of motion defendants 9 went on with their summons, and as a result of it, it was found that a sum of Rs. 6,650 was due to them, and they withdrew from the receiver a sum of Rs. 4,987-8-0 being a dividend of ten annas in the rupee of their claim.

It also appears that prior to the institution of the plaintiff's suit, defendants 10, alleging themselves to be creditors of Noorani, took out a notice of motion in the administration suit for a relief similar to that prayed for by defendants 9 in their chamber summons. This notice of motion was heard, and the claim of defendants 10 was referred to the Commissioner for taking accounts to investigate the said

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claim. By an order made on 7th January 1932, defendants 10 were allowed to receive the amount of the dividend payable to them, and this order was made without prejudice to the contention of the plaintiff that the amount (if any) paid to defendants 10 should be treated as if it was retained in the hands of the receiver and not taken away by them. Under these circumstances, the plaintiff says that defendants 1 to 7 and 9 are not entitled to receive the amounts which have been paid out to them and submits that he is entitled to a decree against them for refund. He further says that he accepts the report of the Commissioner made in the administration suit as regards the property and estate left by Noorani and accepts the same as binding on him but submits that he is entitled to a redistribution of the assets on the footing of all the creditors of the estate being ascertained and to a pro rata refund of the amounts paid to defendants 1 to 7 and 9. In any event, the plaintiff submits that he is entitled to have the amount lying in the hands of the receiver to the credit of the said estate on 7th January 1932, rateably distributed between him and defendants 10 in proportion to their respective claims against the estate, and, of course, subject to the order made on the notice of motion taken out by defendants 10.

The answers made by defendants 1, 2, 3 and 6 and adopted by others are: (1) That a suit of this nature is not maintainable. (2) In any event, the plaintiff is guilty of gross delay and laches as he was aware of the suit and the decree, the advertisements published inviting claims and the notices given under the suit and all further proceedings taken thereon. (3) The suit is barred by the law of limitation. The defendants by their written statement had also contended that they do not admit that the plaintiff was in fact a creditor of Noorani; but at the hearing they have, for the purposes of this case, abandoned the contention, and the plaintiff now has to be treated in this suit as a creditor of Noorani. It would be convenient to deal first with the question of gross delay and laches. The plaintiff is an educated man, a Rai Bahadur, and was doing business in Bombay for at least five or six years prior to 1926. In the beginning of 1927 he was in debt and had many creditors and was, in the middle of the year, declared a defaulter on the Cotton Exchange under the rules of the East India Cotton Association. Although he denies that he knows Gujarati, I have no doubt he is telling a falsehood. His accounts were kept in Gujarati, and he certainly can speak Gujarati. He denies knowledge of that language, because it was put to him that he used to read Gujarati papers and in one leading paper in that language the notice of the Commissioner inviting claims was published, as also the notice of the suit. As stated above, he denies all knowledge of the institution of the suit and the proceedings taken under it. Moneys became due from Noorani on 1st October 1926, and he sent his sub-broker and his Munim to Noorani's Office to demand payment up to 8th October when Noorani committed suicide. It soon became known in the market that Noorani had failed and had many creditors who, the plaintiff admits, were pressing for payment of their claims. After Noorani's death, the plaintiff went to his pedhi once or twice, and his sub-broker and Munim also used to go there. The administration suit was filed on 11th October and on the same day, an interim receiver was appointed, and Noorani's Office was sealed and possession taken by the receiver. The receiver was confirmed on 20th October.

The plaintiff admits that he had seen Noorani's Mehta about two or three days after Noorani's death. He is careful to limit this up to 11th October: but I have no doubt he must have gone to Noorani's Office many times to see what the position was, particularly as he had a large claim against Noorani and he himself was in monetary difficulties. He admits that he understood from his sub-broker that when all the creditors of Noorani would be called for distribution from his estate he would get his share, and he says he thought that the heirs would sell the estate, but he admits he made no enquiries who the heirs were and whether the property of Noorani was subsequently sold. Now, this is a statement which I find difficult to accept, as later on he says he knows the practice of this Court in insolvency or otherwise, particularly as to the filing of claims in insolvency and before the Commissioner; and yet he left Bombay on 1st or 2nd December and did not return till February 1927. His explanation that he went to his native place because of his daughter's marriage may

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or may not be true, but he does not account for his long absence for nearly three or four months, having regard to his position at the time. When he left Bombay however he left two Munims in charge of his affairs, and his brother, upon whose information he ultimately acted and took these proceedings, was admittedly in Bombay.

Between 1927 and 1931 the plaintiff himself used to be mostly in Bombay. He settled with his creditors, and he admits that he used to do business in Bombay, though, he says, it was on a small scale. During this time he had a suit in this Court which went on from 1927 to 1929. It is a fact of general knowledge that Noorani's death had created a sensation in the market as he was a very large trader and it was generally known what was happening in regard to his estate. Apart from that, it is impossible to believe the plaintiff when he says he was entirely ignorant of what was happening, and of the administration suit. From what I have seen of him I disbelieve him altogether, and under the circumstances hold that he was fully aware of the suit and the proceedings under it, and took no action. It may be asked why then he did not come forward all this time. One explanation seems to me that he was playing a hide-and-seek game with his own creditors, and that in the first instance he ran away to avoid them. This was put to him but denied by him. There may be more than one explanation of his conduct, but I do not wish to speculate. It is impossible to hold on the facts before me that a person in his position would do nothing and forego a large claim apparently for nothing. It seems to me that his carrying on business in Bombay although he was declared a defaulter may have something to do with the game which he was playing, and it was only after he settled with his own creditors that he found courage to come forward. Then, again, his brother, on whose information he acted, is not examined, and there is nothing to show how he came to know that dividends were being paid.

The letter which he wrote and the telegram which he sent are not forthcoming. The telegram which the plaintiff sent in reply, in which he says that his claim was "not admitted," suggests that he knows the practice of admission and rejection of claims by the Commissioner. But, then, if he came to know in February of the fact that dividends were about to be paid by the receiver, there is no satisfactory explanation as to why the suit was not filed till September 1931, some five months after he came to know that in fact the receiver had made certain payments to the creditors under the administration decree. Beyond writing the letter of 6th March he did nothing. It is difficult to understand why for all these years he himself took no action in his interest, particularly as he knew that Noorani had died in insolvent circumstances. It was open to him as a creditor to take legal proceedings and bring a suit for administration of Noorani's estate, at any rate when he realized that nothing was done by the heirs. He must have known time would be running against him. His explanation that he thought he would be sent for by the heirs when they started distributing the assets of Noorani among the numerous creditors of Noorani seems to me to be unsatisfactory and unconvincing. As I have pointed out, it is difficult to understand what he was doing between February and September. There is no satisfactory explanation of this. He cannot explain satisfactorily why he did not come in under the administration decree and ask for a stay order immediately on his coming to know that dividends were being paid, particularly as two other creditors having come to know at such a late period of what was happening with regard to Noorani's estate did come forward and received payment in regard to their claims. His solicitors had given him proper advice as appears from the telegram his brother sent under their advice. He did nothing till September and then launched this substantive suit.

Upon these facts I hold that he was guilty of gross delay, negligence and laches, as on his own admission he does not seem to have made the slightest enquiry all these years to ascertain the position of Noorani's estate and to see that his claim was paid. Mr. Bilimoria, who has now left the bar and who has argued this case with ability, says that no question of negligence, delay or laches can arise in the suit, if the plaintiff has a cause of action, and that the only question would be whether there is any bar of limitation. He says that the issue of laches and delay would arise only if the plaintiff had come under the administration decree to prove his debt and

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for a rateable distribution, and the only question in this suit is whether it is barred by the law of limitation. I do not agree. What the plaintiff wants in this suit is that the estate should be redistributed. There is no statutory law which he can invoke. All that he can say is that by analogy of certain provisions under the Indian Succession Act, to which I shall turn at the proper stage, he is entitled to have a rateable distribution and a refund from the creditors who had been paid under the administration decree. Now it is clear on the authorities that such a claim is purely an equitable claim in its nature and the relief claimed is also equitable, and a Court of Chancery always rejects a claim of this nature if the claimant is proved to be guilty of laches, negligence or gross delay. Now, delay in seeking an equitable remedy is technically called "laches." So far back as 1767 Lord Camden in (1767) 3 Bro C C 646 (1), observed as follows (p. 646):

> A Court of equity. . . .has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith and reasonable diligence, . . .

In (1836) 1 Keen 391 (2) it was argued that the case in (1833) 1 My & K 200 (3) established the principle that the decree in a suit for the administration of an intestate's estate does not declare the rights of the parties, and is consequently no final decision against the rights of those who may claim to be next-of-kin against persons who have been found by the Master to be the next-of-kin, and among whom the intestate's estate has been actually distributed. On the other hand it was argued in that case that the plaintiffs had full notice of the proceedings, and although they knew the consequences of their neglect, they voluntarily lay by and permitted the fund to be distributed. The Master of the Rolls, Lord Langdale, observed as follows (p. 403):

> Whether the plaintiffs have now proved that they are next of kin, has not been discussed before me; nor is it necessary; for under the circumstances to which I have adverted considering the knowledge which the plaintiffs had of the former proceedings; their neglect to go in and prosecute their claims; the lapse of time after distribution before the present suit was instituted; the failure of the plaintiffs to establish any case of concealment, or intimidation; or any conclusive recognition by the defendants of the validity of their claims, I am of opinion that the plaintiffs cannot sustain the suit, . . .

This decision clearly establishes the principle that long delay and negligence of the plaintiff, which in other words, amounts in language of equity pleadings to "laches" will disentitle a claimant to come in and establish his claim, even though that claim is not disputed. In (1865) 11 L T N S 761 (4), it was held that a creditor who has neglected to come in at the proper time and prove his debt in an administration suit cannot be allowed to disturb the dividend of the other creditors after an order has been made directing payment thereof. In the short judgment which the Vice-Chancellor delivered he stated that the claimant in that suit had ample opportunity of coming in to prove, and, having neglected to do so, must take the consequences of her laches and could not now be allowed to disturb the dividend of the other creditors. In that suit, it was in July 1864, that an order to pay a dividend to certain creditors who had proved at the time was made. The claimant did not take any steps to prove her debt until October 1864. (1833) 1 My & K 200 (3), on which Mr. Bilimoria relies in connection with another question in this case, was also a suit in which it was held that a creditor would succeed against the next-of-kin in his claim for a refund of rateable distribution provided he is not guilty of wilful default. I hold, therefore, that the plaintiff is not entitled to the relief he seeks in this suit, even if the suit is maintainable, by reason of his gross delay, negligence and laches.

Even if the plaintiff is not precluded from maintaining the suit by reason of his laches and gross delay, I have no doubt that the suit is clearly barred by the law of limitation; and that is the next question to which I shall now turn. In para. 2 of the plaint the plaintiff says that his debt became due at or about the time of the death of Noorani. In the particulars which he has annexed to the plaint he claims interest on the amount from 1st October 1926. In his evidence he admits that the moneys became due to him on 1st October 1926. The administration suit was filed on 11th October 1926, and the

1. Smith v. Clay, (1767) 3 Bro C C 646.
2. Sawyer v. Birchmore, (1836) 1 Keen 391.
3. David v. Frowd, (1833) 1 My & K 200=2 L J Ch 68.
4. Hull v. Falconer, (1865) 11 L T (N S) 761=11 Jur (N S) 151.

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decree was made on 10th November 1930. At that time, therefore, under Art. 115, Lim. Act, the plaintiff's claim was clearly barred unless the suit for the administration of the estate of Noorani saved the claim from the operation of Limitation Act. Mr. Bilimoria, therefore, was constrained to argue that the mere institution of a suit for the administration of the estate of a deceased person saves limitation in favour of every individual creditor and time stops from running. But, it is clear on the authorities to which I shall presently refer that time does not stop running against an individual creditor by the mere fact that a suit for the administration of the estate of a deceased person is instituted.

It cannot be disputed that the institution of such a suit is not one of the circumstances which, under the provisons of the Limitation Act, would prevent time from running. There is no authority which is cited before me to show that the mere institution of a suit by a creditor for himself and other creditors for the administration of the estate of the deceased debtor would save limitation in favour of an individual creditor who is not in fact a party to the suit and who is not the plaintiff. The authorities are all the other way. Proceedings for the administration of the estate in the Chancery Division may be commenced either by writ or by originating summons issued by a creditor or any person interested in the estate as legatee, devisee, next-of-kin or heir, or by the personal representative of the deceased himself. A creditor's action for administration need not under the present practice in England show on the face of it that it is brought on behalf of the plaintiff and all other creditors of the deceased; but a creditor at the date of the issue of the writ or originating summons must show, first, that the debt on which he sues is a debt of the deceased himself, and secondly, that the claim is in time. This action, according to all authorities, can only be instituted by persons whose claims are not barred by any statute of limitation: (1899) 1 Q B 885 (5). Then, the position of a plaintiff creditor in such a suit is described by Williams on Executors and Administrators, Vol. 2, 12th Edn., at p. 1271, in these terms:

Until an order for administration has been made the plaintiff is *dominus litis*, so that he may deal with the action as he pleases. He may settle the matter with the personal representative, by the latter paying the debt and costs of the action, and compromise the action and relinquish proceedings Indeed, the Court will compel the creditor to accept payment of his debt if the personal representative offers to pay it with the costs of the action.

On the other hand, after the usual judgment or order for administration has been obtained every creditor has an interest in the action, and is, in a sense, deemed to be before the Court. The present practice is to allow all creditors to come in under the order, whose debts have become due before the date of the report.

It is clear on the authorities that the Court is not bound to make an order for the administration of the estate if the questions between the parties can be properly determined without such order: (R. S. C., O. 55, R. 10) (1885) 29 Ch D 913 (6). The order may be refused, even if the testator has directed his executors to take proceedings to have his estate administered by the Court: (1888) 38 Ch D 319 (7). R. S. C., O. 55, R. 10-A, provides that upon an application for administration made by a creditor or a beneficiary under a will or on intestacy, where no accounts or insufficient accounts have been rendered, the Court may order that the application shall stand over for a certain time, and that the executors or administrators shall in the meantime render proper accounts to the applicant, with an intimation that if this is not done they may be made to pay the costs of the proceedings; and to prevent proceedings by other creditors or other beneficiaries, the Court may make the usual administration order, with a proviso that no proceedings are to be taken under it without the leave of the Judge in person. The same principles are laid down in Halsbury's Laws of England, Vol. 14, 2nd Edn., para. 844, at p. 443:

Until judgment the creditor, though suing on behalf of himself and all other creditors, is *dominus litis*, and may deal with the action as he pleases: but the judgment enures for the benefit of all creditors, and the plaintiff creditor cannot subsequently thereto accept payment of his debt and allow action to be dismissed.

Then, at p. 449, para. 858, it is laid down that :

5. Barnes v. Glenton, (1899) I Q B 885=68 L J Q B 502=80 L T 606=47 W R 435=15 T L R 295.

6. In re Blake: Jones v. Blake, (1885) 29 Ch D 913=54 L J Ch 880=53 L T 302=33 W R 86.

7. In re Stocken: Jones v. Hawkins, (1888) 38 Ch D 319=57 L J Ch 746=59 L T 425.

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A judgment for administration prevents time from running against the claims of all creditors coming in under the judgment, but the mere institution of administration proceedings is not sufficient to effect this.

Mr. Bilimoria relies on (1827) 1 Sim 393 (8). That case, no doubt, is in his favour; but that case is no longer good law since the decision in (1881) 18 Ch D 551 (9). It was argued in *In re Greaves* (9) that although the judgment in the administration action was not pronounced till after the expiration of six years from the date of the promissory note on which the claim was founded, yet the action was commenced within six years, and reliance was placed on (1827) 1 Sim 393 (8). Jessel M. R. observed as follows (p. 553):

Reliance is placed upon the case in (1827) 1 Sim 393 (8), which was decided in 1827, far too long ago for me to interfere with it now, even if it had not been approved of by Lord St. Leonards. I wish to point out first of all that that case has no application at all to the action before me; and, secondly, the creditors had better not rely upon that decision for the future.

The reason for this is set out at p. 554 in these words:

In the first place, the Statute of Limitations did not affect Courts of Equity, because it only applied to what were commonly called common law actions. If any action is properly described by the statute of James, that statute applies to the action now before the Court, whether it is brought in one Court or another; and the statute is consequently binding upon the High Court—there is no question about that—in every case to which it applies. Bills in Equity have been abolished, and wherever it is an action to recover a debt upon a contract, the statute is binding upon the High Court in every case in which it applies.

On this point Williams observes at p. 1243 as follows:

It appears to be now settled that an action for administration brought by one creditor (not on behalf of himself and all other creditors) does not save the claim of another creditor which was barred by the Statute of Limitations before judgment. And it may perhaps be doubted whether at the present time the position would be different even though the one creditor sued on behalf of himself and all other creditors.

And the authorities cited in support of this statement are: (1) (1881) 18 Ch D 551 (9) to which I have referred, and (2) (1835) 1 Y & C 434 (10). In Lightwood's Time Limit on Actions, at p. 312, it is observed as follows:

The writ only saves the statute for the purpose of the particular action which it originates.

Then at p. 313, it is observed that:

In Ireland the case in (1827) 1 Sim 393 (8) was treated with more favour than here.

Then, dealing with other cases at p. 314 the following observations are made:

For England, however, the rule in(1827) 1 Sim 393 (8) was abolished by *In re Greaves* (9), where Jessel, M. R. pointed out that the reasons upon which the rule was based had ceased to exist. The Act of 1833 had already imposed an express limitation in equity on judgment debts, and the effect of the Judicature Acts, he held, was to make the statute of James binding upon each division of the High Court as regards simple contract debts. Hence the Chancery Division was bound to apply the six years' limitation to such debts. Moreover, as regards actions for administration of personal estate, the action was not expressed to be on behalf of all creditors, nor under the present practice were there any considerations of expense which required that it should be treated as the action of all creditors.

Then, later on, at the same page, it is observed:

As soon, however, as a judgment is pronounced to the benefit of which the creditors generally are entitled, the statute ceases to run against those whose debts are not then barred. Every one who has a subsisting claim at the time of the administration judgment is entitled to participate in the assets.

The authority cited is (1872) 7 Ch A 646 (11). At p. 315 the following observations occur:

And where there has been a judgment for administration, it stops the statute, notwithstanding that a creditor, who has proved under the judgment, has to take an independent step, such as a petition for a sale, in order to obtain payment of his debt. . . . It is assumed that the creditor duly comes in under the judgment; otherwise he cannot rely upon it as stopping the statute in his favour.

The cases cited in support of this statement are: (1) (1893) 31 L R Ir 95 (12); (2) (1835) 1 Y & C 434 (10) and (3) (1844) 3 Hare 347 (13). It is argued that the cause of action in this case is not debt but a right to refund, and the article of the Indian Limitation Act applicable would be Art. 120. The answer to it is that if the plaintiff has no enforceable claim at the date of the suit as a creditor, it is difficult to see how he can be said to be a creditor. It is difficult to see that he has any cause of action if he is not a creditor with an enforceable claim. Then it is said that the plaintiff must be deemed to be a party to the administration action. Now, excepting the case in (1827) 1 Sim 393 (8) in which it was observed that a

8. Sterndale v. Hankinson, (1827) 1 Sim 393=27 R R 210.
9. In re Greaves, Deceased: Bray v. Tofield, (1881) 18 Ch D 551.
10. Berrington v. Evans, (1835) 1 Y & C 434.
11. In re General Rolling Stock Co., (1872) 7 Ch A 646=41 L J Ch 732=27 L T 88=20 W R 762.
12. In re Ebbs' Estate, (1893) 31 L R Ir 95.
13. Tatam v. Williams, (1844) 3 Hare 347.

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creditor, after the institution of an administration action has an inchoate interest in such an action, there is no authority in favour of this proposition. It was pointed out by Davar, J., in 34 Bom 420 (14) that in an administration suit it is extremely undesirable that individual creditors should be added as parties unless they show some very strong reason, and that the mere willingness of the applicants to bear their own costs does not counterbalance the delay caused by the addition of a party and the consequent increase in the costs of other parties. Now, although a creditor may have an inchoate interest in such an action, he cannot be said, in my opinion, to be a party to such action. This, as I have pointed out, is made clear in Williams on Executors. Cases in England have gone to the extent of holding that an individual creditor is not a party even though he appears in response to an advertisement. In (1907) 1 Ch 719 (15), an order had been made in a creditor's action for accounts and enquiries and the administration of the estate of *S*. A creditor whose debt had been admitted for £10,000 applied for leave to attend the proceedings at his own expense, or that he might at his own expense be supplied by the defendants' solicitors with a copy of the list of claims lodged in the action and copies of affidavits relating thereto, and that the defendants might be directed to give him notice of all proceedings to be taken under the order in reference to claims against the estate. It was held in that case that there was no power under the rules to give leave; that this was a matter for the discretion of the Court under the general power of the Judge to manage the business in his own chambers; that general leave to attend the proceeding would impede the progress of business in chambers and ought not to be given. The rule relied upon by Parker, J., which is R. 47, O. 16, is in these terms:

In any cause or matter for the administration of the estate of a deceased person, no party other than the executor or administrator shall unless by leave of the Court or a Judge, be entitled to appear either in Court or chambers on the claim of any person not a party to the cause or matter against the estate of the deceased person in respect of any debt or liability.

Then the learned Judge observes that a creditor comes in under the advertisement for claims, but he is never made a party by service of notice of judgment, the reason being that if an individual creditor is allowed to be a party to these proceedings, the administration of the estate will be embarrassed in the greatest possible degree. Williams in his Executors and Administrators observes at pp. 1271-2 as follows:

In an administration action no party other than the personal representative may, except by leave of the Court, appear either in Court or in chambers on the claim of any person not a party to the action. The Court may however direct or give liberty to any other party to the action to appear either in addition to or in place of the personal representative, upon such terms as to costs or otherwise as it thinks fit.

Our own rule is contained in O. 1, R. 8, Civil P. C., under which a representative suit is never allowed to be instituted except with the leave of the Court. Sub-cl. (2) undoubtedly contemplates that a person on whose behalf or for whose benefit a suit is instituted may apply to the Court to be made a party to such suit. But it is clear on the authorities that the Court will not compel the plaintiff to add the persons on whose behalf he sues as co-plaintiffs. In 34 Bom 420 (14), the suit was brought by a creditor for the administration of the estate of the deceased debtor, on behalf of himself and other creditors; one of the creditors applied to be joined as a party, and it was held that he should not be so joined unless the Court was satisfied that his interests would be seriously prejudiced if he was not so joined. This disposes of the contention that the plaintiff in this case must be deemed to be a party to the administration action, and therefore time will cease to run. I may now refer to a contention which was advanced right at the end of the case. Mr. Bilimoria stated that the date as to when moneys became due from Noorani was wrongly given by the plaintiff in his plaint and in his particulars, and that the claim of the plaintiff against Noorani under the rules of the East India Cotton Association could not ripen until May 1927, as the contract was of April-May 1927 vaida. He then applied formally for leave to amend the plaint and stated that the plaintiff's debt became due in May 1927. The application was opposed. It seems to me that,

14. Vassonji Tricumji & Co. v. Esmailbhai Shivji, (1909) 34 Bom 420=11 Bom L R 1054.
15. Schwabacher, In re: Stern v. Schwabacher, (1907) 1 Ch 719=76 L J Ch 399=96 L T 564=51 S J 326.

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having regard to the fact that the plaintiff was a defaulter, he certainly would not be entitled to take the benefit of the rules under which it may be that he would be entitled to recover those moneys in May 1927, from Noorani. Apart from that the application is made at a very late stage, and to grant the application would deprive the defendants of a vested right of pleading limitation against the plaintiff, and no Court under such circumstances would grant the amendment. But the fact remains that the plaintiff himself admitted in his evidence that the moneys became due on 1st October 1926, and that he went to demand the same from Noorani in his lifetime, and from his heirs and Mehta after his death. I therefore rejected that application.

I hold therefore that the claim in the suit is barred by the law of limitation. This leaves the most difficult question in the case as to the maintainability of a suit of this nature, to which I shall now turn. Mr. Bilimoria bases his claim first on the rule contained in S. 323 and the proviso to S. 360, Succession Act. Then he relies on the case in (1833) 1 M Y & K 200 (3) and on a passage in Williams on Executors and on Daniel's Chancery Practice, Vol. 1, p. 899. He admits that none of these authorities create specifically any right in favour of a creditor for a refund from other creditors when the estate has been administered by a Court of Equity as the result of which all other creditors who had proved their claim under the judgment for administration had been paid. But he says that the proviso to S. 360 assumes the existence of a right of a creditor or claimant to follow the assets. He then says that the legislature allows a creditor to go against a satisfied legatee, and it was a mere oversight on the part of the legislature not to have placed the creditor in the same position in relation to paid off creditors.

In England whether the estate is administered out of Court or in Court, the administration involves three distinct duties, viz., collection of the assets, payment of the debts, and distribution of the surplus to the persons beneficially entitled. The property of a deceased person which is liable to answer his debts, is called his assets. The position as to the order in which debts had to be paid in England was somewhat complicated, and yet at one time the order for priority was different according as the estate was administered in Court or out of Court, but since the Administration of Estates Act, 1925, came to be enacted by S. 34 a uniform set of rules is laid down for the administration of an insolvent estate, and after payment of certain debts, such as the funeral, testamentary and administration expenses, the rule is that the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities, as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt. The general rule in bankruptcy is that all creditors must be paid pari passu. Certain debts however are preferred debts, whereas others are deferred. According to the order of payment under the bankruptcy practice, after the payment of preferred debts which are not more than five or six, all other debts are paid pari passu. As among creditors in equal degree, an executor has a right to prefer one to another. He may pay one in full although the payment leaves nothing for the others. If the personal representative distributes the estate among the beneficiaries without discharging all the debts and liabilities, any person who has a claim against the estate is entitled to "follow the assets", that is he may sue any beneficiary, and claim payment from him to the extent of the assets received by him : (1879) 4 Ex D 256 (16).

By S. 32 (2), Administration of Estates Act, 1925, if the beneficiary has disposed of the property, he is personally liable for the value of the interest so disposed of by him. Very extensive powers are given to the Court by S. 38 of that Act for the enforcement of this right to follow the assets on the application of any creditor. The right of following the assets is a purely equitable right, and the Court will not allow it to be exercised if the conduct of the creditor would render its exercise inequitable : (1886) 32 Ch D 571 (17). An unpaid creditor has also a

16. Hunter v. Young, (1879) 4 Ex D 256=48 L J Ex 689=41 L T 142=27 W R 637.
17. Blake v. Gale, (1886) 32 Ch D 571=55 L J Ch 559=55 L T 234=34 W R 555,

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right to sue the personal representative and enforce payment of the debt against him to the extent of the assets which he has distributed, unless he has administered the estate under the Court's direction or has taken advantage of S. 27, Trustees Act, 1925, 15 Geo. V, c. 19, which allows him to advertise for creditors and distribute the estate after paying all debts of which he has notice.

When a personal representative, after distributing the assets, is compelled to discharge a debt or liability of the estate, he has a right to call upon the beneficiaries to refund the amount of the assets received by them, or sufficient to indemnify him, if, at the time of the distribution, he had no notice of the debt, or in the case of a contingent liability, even if he had notice; but he has no such right if he distributed the assets with knowledge of the debt and the right only extends to the recovery of the amount received by the beneficiaries and not to interest on it.

Prior to the passing of Lord St. Leonard's Act, 22 and 23 Vic. c. 31, S. 29, which is now replaced by S. 27, Trustees Act, 1925, no executor could safely distribute the assets of his testator except under the direction of the Court which involved great expense and frequently great delay. Therefore the statute came to be passed and provided that an executor after issuing certain advertisements might distribute the assets, and should not then be answerable for any more than he would have been if he had distributed them under the decree of the Court. S. 360, Succession Act, which is *en pasant*, it may be observed, in similar terms, affords relief to an executor or administrator who has distributed the assets after giving due notice on the expiration of the time mentioned therein and in ignorance of claims of which he had no notice. If the executor pays away the assets in legacies, and afterwards debts appear, of which he had no previous notice, and which he is obliged to discharge, he may compel the legatees to refund: see (1802) 3 East 120 (18), (Cf. S. 359, Succession Act). A creditor's primary remedy lies against the executor and not the legatee. The Court of Chancery, however in order to do justice and to avoid the evil of allowing one man to retain what is really and legally applicable to the payment of another man, devised a remedy by which when the estate has been distributed, either out of Court or in Court, without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiaries or the next of kin: (1904) A C 1 (19). This right of the creditors, as I have pointed out, is purely equitable in England: (1886) 32 Ch D 571 (17); and so equitable defences may be raised against the claim, e. g., laches, acquiescence. In dealing with the position of a creditor qua a legatee, Williams observes as follows (p. 986):

> In what cases a creditor of the testator can call on a legatee to refund. An unsatisfied creditor, even though he may also be the executor, can compel a satisfied legatee to refund, whether the legacy was paid voluntarily or by compulsion. He has this right whether the testator's estate at the time of his death was, or was not, sufficient to satisfy both debts and legacies; and though the assets were handed over to the legatee by the personal representative in ignorance of the creditor's demand.

The general principle governing the position of creditors of an estate under administration by Court was laid down in 9 C W N 167 (20), and it is this: that creditors will, on due cause shown, be let in at any time while the fund is in Court, and that, even where the money has been apportioned amongst the creditors and transferred to the Accountant-General for payment to them. If there be no wilful default, a creditor coming in afterwards will be allowed to establish his claim, and there will be rateable apportionment among creditors without preference or priority. But the default of a creditor guilty of remissness in the assertion of his claim will not be allowed to operate to the prejudice or inconvenience of others more diligent than himself. But if a creditor who, for some reason or other, has been excluded from a first dividend and later on has his claim admitted to the schedule so as not to disturb past dividends, and if further assets come in, then he is entitled to have a preferential dividend paid to him out of such assets before any further dividend is paid to others, who had already been

18. Doe v. Guy, (1802) 3 East 120=4 Esp 154=6 R R 563.

19. Harrison v. Kirk, (1904) A C 1=73 L J P C 35=89 L T 566.

20. Rose v. Biddadhurry Dassee, (1881) 9 C W N 167.

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paid : (1743) 1 Atk 245 (21). The law and practice in England, to which I have referred, is, as far as I can see, reproduced with slight modification in our Succession Act, with the exception of S. 323 which makes a wide departure. That section says :

Save as aforesaid, no creditor shall have a right of priority over another ; but the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably as far as the assets of the deceased will extend.

It seems to me that S. 323 merely lays down a rule of procedure that must be followed by an executor or administrator. It is clearly not applicable when a creditor who has obtained a judgment and decree against the estate of a deceased person applies to execute the decree against the estate in the hands of the legal representative of the deceased : 6 L B R 158 (22). This is clear from another rule of procedure which is laid down in Ss. 50 and 52, Civil P. C. S. 50 is in the terms following :

(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased, which has come to his hands and has not been duly disposed of ; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

In other words, under this section, a decree-holder is entitled to execute the decree which he has obtained, against the legal representative of a deceased judgment-debtor, and such legal representative can only escape liability by saying either that no assets of the deceased judgment-debtor had come to his hands, or that after they had come to his hands they had been duly applied in the course of the administration ; but he is liable if he has wasted the assets come to his hands without satisfying the debts of the deceased. It is important to note that the liability in this case is of the legal representative, and it is limited to the property of the deceased which has come to his hands. It was held in 22 Mad 194 (23) that a decree-holder is entitled under the section in the old Act corresponding to this section to have the amount of the decree paid out of the assets of the deceased in the hands of the legal representative which have not yet been duly disposed of. Hence the legal representative is bound to pay to the decree-holder the full amount of the decree, though there may be other creditors of the deceased, and the assets may not be sufficient to pay them all in full. Then comes S. 52 of the Code which says :

Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

So that here at least is one instance of one creditor getting more than his rateable share than the other creditors where the assets are insufficient. If the executor pays the full amount of the decree, as he must under these provisions out of the assets in his hands, it cannot be said that they were not duly applied though there are other creditors who have not been paid. This principle as to the rights of an execution creditor was first laid down in 12 Beng L R 287 (24) by Couch, C. J. who, incidentally it may be observed, was on the Committee which ultimately came to enact S. 282 of the old Succession Act, which corresponds to S. 323 of the present Succession Act. This decision was cited with approval by this Court in 17 Bom 637 (25). It was also relied upon by the Calcutta High Court in 25 Cal 54 (26). Then S. 322 clearly contemplates the priority of rights among creditors. After mentioning certain debts which have to be paid in priority, it says: "and then the other debts of the deceased according to their respective priorities (if any)."

Then, under S. 323, what is of importance to note is that the liability of the executor to pay debts *pari passu* is limited to the debts which he knows of. Rateable distribution is allowed by the section only among the creditors as the

21. Snee v. Prescott, (1743) 1 Atk 245.
22. Ma Min Dwe v. C. A. P. C. Shunmugam Chetty, (1912) 6 L B R 158=18 I C 510=5 Bur L T 288.
23. Venkatarangayan v. Krishnasami Ayyangar, (1898) 22 Mad 194.
24. Nilkomul Shaw v. Reed, (1872) 12 Beng L R 287=17 W R 513.
25. Khusrubhai Nasarvanji v. Hormajsha Phirozsha, (1892) 17 Bom 637.
26. Omrita Nath Mitter v. Administrator General of Bengal, (1898) 25 Cal 54.

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executor is aware of, and the legislature apparently has not dealt with the creditors of whom the executor had no notice or knowledge. What about them? S. 323, therefore, is nothing more than a rule of procedure which has to be observed by the executor in paying the debts of the deceased. Mr. Bilimoria relies upon a dictum of Chandavarkar, J. in 29 Bom 96 (27). Having decided the appeal on the question of res judicata the learned Judge then observed as follows (p. 101):

> This result is no doubt to be regretted, because it virtually gives preference to one creditor as against other creditors of the deceased's estate whereas the rule of law is that they shall all share rateably. But the result is due to the fact that that rule of law has to give way in this case to another rule, i. e. the rule of res judicata . . . . . We think that we must take this opportunity of impressing upon the Mofussil Courts the necessity of treating a creditor's action against a deceased person's estate as an administration suit and insisting upon the amendment of the plaint in such a suit on that basis. Where the plaintiff is not willing to amend, the Court if it finds the claim proved, should pass a decree simply giving him a declaration of the debt due and a declaration besides that he is entitled to satisfaction of the decree according to law in due course of administration and not otherwise.

With all sincere respect to the learned Judge, I am unable to agree in these observations. The question of rateable distribution only comes in and becomes material when the assets are insufficient, and that is clear from the language of S. 323, Succession Act. Then when a creditor sues a legal representative for a debt due by a deceased person, the Court is not in a position to know if the assets are sufficient or not. An administration action is not exactly a song which anybody may sing at any time. The mere fact that a representative suit is not allowed to be filed except under special circumstances and by special leave of the Court shows the danger of converting a simple creditor's suit into an administration action. But even if one were to file an administration action, the Court is not bound to make an administration decree or order. As I have pointed out from the authorities in England, the Court may refuse to pass an administration decree if the claim of the plaintiff who sues for administration is satisfied or is such that it could be disposed of without landing the estate into what may happen to be a protracted and expensive litigation. Why should, therefore, in the case of a simple suit by a creditor, he be asked to convert it into a costly and protracted litigation such as an administration action? Then, further, what about the procedure laid down in O. 1, R. 8, Civil P. C.? As far as I can see, a representative suit cannot be instituted under the Code except under the provisions of O. 1, R. 8, and if the Court were to convert a simple suit by a creditor into a representative suit, other difficulties will arise. That is why sub-s. (2), S. 50 empowers the Court in a proper case to compel the legal representative to produce his accounts, and it is clear that the Court has the power in a proper case to order accounts and to make inquiries for this purpose. To accept this dictum is entirely to nullify and ignore the rule of procedure laid down in Ss. 50 and 52, Civil P. C., which clearly contemplate a suit by a creditor against a legal representative for the debt of the deceased, or a suit against the legal representative for a debt created by the legal representative himself.

The usual decree, which under the practice of this Court is made in such a case, is to limit the decree to the assets of the deceased, if any, in the hands of the defendant, which means, of course, assets not duly applied for. I now come to the proviso to S. 360. It is conceded that it does not create a right, but it saves one if the statute has given it. The statute has given a right as S. 361 and the sections which follow it show. Then why is this an oversight? If the legislature intended to give a creditor a right to proceed against other creditors, it would have said so. It cannot be argued that the legislature is ignorant not of any other law made by it anywhere else but of a section of the statute which it has enacted and which it has reproduced differently from the English law, when the rest of the statute embodies the whole of the English law. Besides I do not think it is open to a Court to accept an argument which is based upon an oversight of the legislature. In Vol. 27, at p. 146, para. 274, Halsbury observes as follows:

> It is not competent to any Court to proceed upon the assumption that Parliament has made a mistake, there being a strong presumption that Parliament does not make mistakes; and, as a rule, it is not permissible to supply omis-

27. Bai Meherbai v. Maganchand, (1905) 29 Bom 96=6 Bom L R 853.

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sions, even though they are evidently unintentional.

It is sufficient for me to say that the legislature has not said so, and, therefore, as far as I am concerned, there is an end to the whole argument. But what does the proviso say? It says: "Follow the assets." Now, this clearly is language which is commonly used in cases of trust property. I have already explained how that expression is construed under the English law. Dealing with this question, Williams observes at p. 1096 as follows:

> This may be a convenient place in which to mention the right to follow assets. It has been shown in an earlier part of this work (p. 569) that, in view of the wide powers of disposition vested in personal representatives, creditors and legatees have no right to follow assets into the hands of purchasers from the representatives.
>
> On the other hand, it is now clearly established that where the proceeds of the assets can be identified they remain subject to the trust, and can, therefore, be followed into the hands of representatives and those claiming through them otherwise than for value.

I have also dealt with the right of the creditor to follow the assets in the hands of the legatees. S. 361 and the following sections clearly preserve a right of the creditor to go against a satisfied legatee for refund in the event of his debt remaining unpaid. This then being the English law, is there any reason why the same expression which was taken from the English law should be construed differently? In my opinion, to do so would be to legislate. If it is said that unless you did that you cannot give effect to S. 323, I do not see why. That section, as I have pointed out, lays down only a procedural rule which has to be followed by executors. If an executor follows it and further follows the provisions of S. 360 he is protected. If he does not, he is liable. Why should a creditor who has been vigilant and who has besides in his favour an order of the Court be made to suffer in favour of another creditor who has not come forward in time to claim his debt? A creditor, as I have pointed out, has clearly a remedy to come in at any time and after any amount of delay, unless it amounts to gross delay or laches, under the administration decree itself, and claim a rateable distribution. Is there any special equity in favour of a creditor in the position of the plaintiff as against bona fide creditors who too give value for what they receive and actually receive less than the full value? If the executor pays out of Court, the unpaid creditor has a remedy against him. He has also a remedy against the legatees for refund. If the Court pays other creditors, the creditor can come in under the administration decree at any time unless he is precluded from so coming. I think public interests require that Courts should administer estates as speedily as possible and that there should be a definite limit to such litigation, even though there may be an apparent hardship in a particular instance. *Interest republicae ut sit finis litiam.*

Mr. Billimoria relies on a decision of Tyabji, J. in 37 Bom L R 642 (28). It is conceded that this decision does not apply to the facts of this case, and if it did, whatever my view of the judgment may be, I would certainly have followed it as being the judgment of a Judge of co-ordinate jurisdiction. But I consider myself fortunate in being free to decide the case before me without following the judgment in that case. But there are one or two observations which I should like to make with regard to that case. In that case, as appears from the recital of the facts in the report, a certain person was indebted to a trust, of which defendant 1 was a trustee. He then died leaving property of considerable value which, it appears, became reduced in course of administration. To secure the trust amount, the trustee (defendant 1) obtained from the executrix title-deeds of certain properties belonging to the estate of the deceased by way of equitable mortgage. Then the trustee (defendant 1) brought a suit to enforce the equitable mortgage and obtained a final decree for sale.

After this the grandsons of the deceased brought a suit for the administration of the estate, and in that suit Mr. Moos was appointed receiver. Then it appears, the plaintiffs, who were some of the creditors, brought a suit for a declaration that the mortgage in favour of the trustee (defendant 1) and the decree obtained by him gave him no priority over the claims of other creditors of the deceased's estate, and that all such creditors as well as the trustee (defendant 1) were only entitled to rateable distribution of the proceeds of the estate, which was not sufficient to

28. Mathuradas v. Raimal, 1935 Bom 385 = 159 I C 533=37 Bom L R 642.

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meet the claims of all the creditors in full. Now, I find it rather difficult to understand how this suit was allowed to be maintained when there was an administration action pending. The very fact that the learned Judge found it necessary to go into the question of the value of the assets and to find out whether the assets were sufficient or not shows the danger of a suit of this nature, instead of allowing the rights of creditors inter se being discussed, ascertained and realized in an administration suit. Secondly, from the statement of facts it does not appear that the suit was filed in a representative capacity under the provisions of O. 1, R. 8, Civil P. C. The learned Judge very rightly rejected the argument of the plaintiff that S. 323 created a trust in favour of creditors. Then the learned Judge referred to S. 359, Succession Act, which provides that :

> When the executor or administrator has paid away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion.

The point to note is that this section does not say that the executor is to call upon creditors to contribute, obviously because when he paid their debts the estate was sufficient, or the assets were sufficient to pay in full all the debts then known to the executor and the legacies, and he may not know the creditor who subsequently appears on the scene. The second point, which seems to have impressed the learned Judge, was that it was an oversight of the legislature. I have already disposed of that argument. The intention of the legislature is to be gathered from the language used by the legislature. I prefer to find the intention from the words used and not from the consideration of a supposed policy, which, in my opinion, is to embark upon a sea of speculation. If there is an obvious gap or omission, it is for the legislature to fill it up. Then the learned Judge refers to S. 361 which provides that :

> A creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies ; and whether the payment of the legacy by the executor or administrator was voluntary or not.

Now, here the legislature clearly provides a remedy for a creditor whose debt has not been paid. It seems to me it would have been perfectly simple for the legislature to say in this section that he has a similar right to proceed against creditors who had received payment. The very language of the section suggests that the only right of the creditor who has not received payment, and where the assets, whether they were sufficient or insufficient, have been utilized for the payment of debts known to the executor or the administrator as also the legacies, is to go obviously against the legatees, because they are volunteers and take the legacies subject to the rights of the creditors. A creditor does not derive title from or under a will or on an intestacy as a legatee or as the next of kin does. An unsatisfied creditor has no lien or charge on the assets of the deceased debtor. His right is to proceed either against the executor or the satisfied legatee. If he proceeds against the executor and the executor is compelled to pay him, the latter can proceed against a satisfied legatee. That seems to be the scheme. In England the position seems to be the same. An unsatisfied creditor can follow the assets in the hands of a volunteer claiming through a legatee but not in the hands of a bona fide purchaser for value or of a mortgagee, the reason being that unsatisfied creditors have no lien or charge on any assets and that persons dealing with the executor in good faith are entitled to look to him alone, and are not bound to ascertain that all debts and liabilities have been discharged. But, of course, where the executor has not parted control over assets, or where the legacy is represented by a fund in Court, the purchaser from the legatee takes subject to the rights of the unsatisfied creditors, though their claims be established after purchase.

Then the learned Judge says that the decree was obtained in that case by the trustee (defendant 1) in the absence of other creditors. But what about sections 50 and 52, Civil P. C.? These sections clearly contemplate an action of a perfectly simple nature by an individual creditor to recover the debt in which the deceased was indebted to him against his legal representative out of the assets come to his hands. There can be no question of the other creditors being aware of that suit.

It is perfectly open to any creditor, if he thinks that the assets are insufficient,

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to bring in an administration action and to apply for stay of a suit by a single creditor ; and I am unable to see why the claim of a person who has obtained judgment against the estate of a deceased person should be subordinated to the claims of other creditors merely because S. 323 directs the executor to distribute the estate rateably if that estate is insufficient. The scheme under the Indian Succession Act seems to me to be this, namely, that when the executor finds that the assets of a deceased person are insufficient for the payment of his debts in full, he has to pay rateably, and S. 323 casts the duty on the executor. If the executor is about to act in contravention of that duty, there is a perfectly simple remedy open to the creditor, and that is to file an administration action. If, on the other hand, payment has already been made and the executor cannot be protected because he has not acted in accordance with S. 360, then there is a remedy open to the creditor to proceed against the executor, who in his turn has a right to proceed against the legatees. S. 360, which was enacted to protect the executors making bona fide payments to creditors and in order that the administration of estates should not be unduly and indefinitely hampered, saves a right which the legislature gives to the creditor when he finds that the estate has been distributed by the executor properly and enables the creditor to proceed against the legatees. I do not, therefore, agree that legislature has been guilty of an oversight assuming that it is open to me to consider whether it is or not. This brings me to two other provisions, of law which have an important bearing on the action. Order 20, R. 13, Civil P. C., which is based upon the English statute to which I have referred, provides in effect that in the administration by the Court of the property of a deceased person, if such property is insufficient for the payment in full of his debts and liabilities, the rules which obtain under the Insolvency Act or in bankruptcy practice are to be followed. That exactly is the practice in England, as I have pointed out. The section of the Presidency-towns Insolvency Act, which lays down the rule which is followed in bankruptcy practice, is in these terms :—

Sec. 72. Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the official assignee any dividend or dividends which he may have failed to receive, before that money is applied to the payment of any future dividend or dividends but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

Exactly the same principle was laid down in the case to which I have referred, namely, (1865) 11 L T (N S) 761 (4), in these terms :—

A creditor who has neglected to come in at the proper time and prove his debt in an administration suit, cannot be allowed to disturb the dividend of the other creditors after an order has been made directing payment thereof.

The only right which a creditor who has not received his dividend has is under this section : 9 C W N 167 (10). It seems the right is based upon an equitable principle, and that is that he cannot disturb the distribution already made, but he is certainly entitled to participate in any future distribution which is to be made or out of the moneys in the hands of the official assignee as is observed in (1904) A C 1 (19). The principle at the bottom of these authorities is that a creditor must be diligent. I shall now consider what the practice in England is in such cases, and refer to the cases, some of which have been cited at the bar. As pointed out before, by virtue of the provisions of the Administration of Estates Act, 1925 :

Where a person dies after 1925. . . . Crown debts, judgment debts, specialty debts and simple contract debts are, subject to the rules in bankruptcy in force for the time being, all payable *pari passu* out of his estate. Hence it is conceived that a personal representative may prefer any one of these debts to any other of them. In such a case, therefore, a creditor cannot, by obtaining judgment defeat the right of preference.

On the other hand it is conceived that the right of preference, being exercisable only among creditors of equal degree, cannot be exercised so as to defeat either the priority of preferred debts or the postponement of deferred debts prescribed by the bankruptcy rules in force for the time being.

After an order appointing a receiver or an order for administration has been made the right of preference cannot be exercised. If personal representatives exercise such right, or, indeed, make any payment after such an order has been made, the utmost that they are entitled to is to stand in the place of the creditors with respect to those payments. (Williams, p. 647).

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(1826-27) 3 Russ 130 (29) is the leading authority upon the general rights of a creditor who comes late under the decree. The facts were that in an administration action creditors were paid. There was an apportionment order for legatees. Certain bank annuities were to be purchased and then given to the legatees. After this was done, one creditor petitioned to be at liberty to go and prove his debt, and that the bank annuities which were with the Accountant-General and therefore subject to the control of the Court might be sold and his debt satisfied. The Master reported that the debt due to the creditor was £1,636. In the meantime the fund in Court had been apportioned by the Master among the annuitants and the unsatisfied legatees, and part of it was paid out in discharge of some of the legatees. The creditor then made another petition that certain annuities were still outstanding and prayed for payment. It was argued that a creditor who comes in late cannot interfere with payments which have been made—with a distribution which has actually taken place; but he can look for the satisfaction of his claim only to an unappropriated residue, which may be in Court and subject to the control of the Court, or to assets which may be collected in future. The Lord Chancellor held that the creditor was entitled to receive out of the funds of the legatees so remaining in Court, not the whole of the debt, but only part of it bearing the same proportion to the whole as the legacies given to those legatees bore to the whole amount of the legacies given by the will; and his judgment is so important on this whole question that I make no apology for quoting it here. The Lord Chancellor said (p. 136):

Although the language of the decree, where an account of debts is directed, is that those, who do not come in shall be excluded from the benefit of that decree; yet the course is to permit a creditor, he paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in Court or in the hands of the executor, and to pay him out of that residue. If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees, and bring back the fund, he may do so: but he cannot affect the legatees, except by suit; and he cannot affect the executor at all. The present case is involved in much singularity. Previously to January 1825, several of the legacies had been paid by the executor; and the order of January 1825 is a judgment of the Court in favour of the executor, with respect to these payments—a judgment which sanctions them upon the ground of there being a report that all the creditors had come in and were paid. The executor being thus indemnified as to these legacies, there were left in Court certain funds, which were directed to be appropriated to legatees who had not been paid. In the following November the creditor makes his application: the Court thinks proper to allow him to go in and prove his debt; and that order stands unreversed. In December 1825, the Master makes his report, and appropriates the fund in Court among a number of individual legatees. Now, when the creditor made his first application, it would have been well if the real state of the case had been disclosed to the Court. The question would then have been, whether a creditor, so coming in, was to be paid his debt by three or four legatees, while the other legatees had received their legacies in full; or whether the rule of the Court was not that he should take from the unpaid legatees such a proportion only of his debt as would have been borne by those three or four legatees if he had applied before the other legacies were paid, and that he should be left to recover the residue of it by what means he best might. In short, the question is, on whom, under such circumstances, does the burden lie of enforcing contribution against the legatees?

This case therefore clearly shows what the practice in England is; and, as I said, it is a leading authority on the subject which has been followed in later cases, to some of which I shall presently refer. The practice is that the right of an unsatisfied or unpaid creditor, who has not come in under an administration decree to obtain payment in respect of his debt, unless he is precluded from exercising it by reason of negligence, default or laches or any of the circumstances which would make it inequitable on the part of the Court to make a decree in his favour, is not by way of action but by way of a petition under the administration action itself; secondly, such a petition can only succeed if the fund is in Court or subject to the control of the Court; and, thirdly, the claim can only be made against satisfied legatees, and that a claim of this nature can never succeed against the creditors who have already been paid in respect of their debts. This is how the case is understood by Williams (p. 882):

Lord Eldon held that the creditor was entitled to receive out of the funds of the legatees so remaining in Court, not the whole of the debt, but only part of it, bearing the same proportion to the whole as the legacies given to those legatees bore to the whole amount of the legacies given by the will; and that he must seek the

29. Gillespie v. Alexander, (1826-27) 3 Russ 130=27 R R 35.

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payment of the rest of his debt, in proper proportions, amongt those legatees who had been actually paid.

This decision was relied upon in another important case to which I shall next refer, namely, (1833) 1 My & K 200 (3). In that case, an intestate's estate had been distributed under a decree in an administration suit among persons found by the report to be his next of kin. Rather more than a year afterwards, notice was filed by a person claiming to be the sole next of kin of the intestate against the persons among whom the estate had been distributed for the purpose of compelling the defendants to refund to the plaintiff the shares they had received. The plaintiff had had no notice of the administration proceedings, and it was held that if, on inquiry, the plaintiff established that she was sole next of kin of the intestate, the defendants were bound to refund to her the several sums they had received in the administration suit ; and, that if the plaintiff established that she was one of the next of kin of the intestate, the defendants were bound to repay to her the amount of the sum which the plaintiff, in that case, should appear to be entitled to. There are certain observations in the judgment of the Master of the Rolls which are relied upon on behalf of the plaintiff.

In the first place, it is nowhere said by the Master of the Rolls that a creditor who is ignorant of the administration decree and has not been paid can bring an action against other creditors. The judgment must be read with the facts of the case. The claim there was by a next of kin against other next of kin. Then the Master of the Rolls refers to the position of creditors, and as to the principle applicable in the case of a creditor, he relies upon (1826-27) 3 Russ 130 (29) and then observes that that decision establishes the principle that legatees, who had received payment under the order of the Court, were bound to refund to a creditor who had never claimed before the Master. It seems to me that the judgment read as a whole is not an authority for the proposition advanced by Mr. Billimoria. In my opinion, the case in (1833) 1 My & K 200 (3) establishes only the principle that the decree in a suit for the administration of an intestate's estate does not declare the rights of the parties and is consequently no final decision of the rights of those who may claim to be next of kin against persons who have been found by the Master to be the next of kin and among whom the intestate's estate has been actually distributed. In (1816) 1 Madd 529 (30), the fund was in Court, and it was held that the parties claiming redistribution must come in under an administration suit. The same principles are laid down in (1902) 2 Ch 684 (31).

I have dealt with the practice which is followed by the Court of Chancery in England. In this connexion I shall refer to (1904) A C 1 (19). The facts were that in 1877, Richard Davison Harrison mortgaged part of his real estate in Ireland for £8000 to one Wallace. In January 1888, he died, having by will made the appellant his residuary legatee and devisee. In April an action was brought by a creditor for the administration of the testator's estate. In July the primary decree was made in the usual terms for accounts and inquiries. In November advertisements were issued in newspapers requiring all creditors to send in their claims on or before 4th December 1888, in default whereof they would be peremptorily excluded from the benefit of the decree. The mortgagee, Wallace, made no claim against the personal estate, but in February, 1889, he made an affidavit in the administration suit verifying his claim to the mortgage debt and interest charged upon part of the real estate. At that time the lands mortgaged were believed to be a sufficient security for the claims upon it. In June 1902, the respondent Kirk, in whom the mortgage was then vested, moved for leave to claim for a debt of £7,000 and interest against the personal estate. It was opposed by the residuary legatee, Henry Harrison, the appellant. The application was rejected by the Master of the Rolls; but this decision was reversed by the Irish Court of Appeal who made an order permitting the respondent to prove his claim on certain terms as to costs, etc. The appellant then appealed to the House of Lords. The judgment of Lord Davey is so important that I would like to refer to it in some detail (pp. 5, 6):

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30. Angell v. Haddon, (1816) 1 Madd 529.
31. McMurdo, In re : Penfield v. McMurdo, (1902) 2 Ch 684=71 L J Ch 691=86 L T 814=50 W R 644.

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When the Court of Chancery had taken into its own hands the administration of an estate, it restrained creditors from pursuing their legal remedy against the executors. The Court made a decree for the administration of the estate which operated as a judgment for all the creditors, and, as it precluded the creditors from ascertaining their legal remedies, it provided other means for them to obtain payment of their debts. The Court was bound to see that the creditors whom it restrained from pursuing their legal remedies were not deprived of the means of having the assets of the testator applied to the payment of their debts. It is an entire fallacy, but I think a very common one, to suppose that because the debt had to be proved, or the payment of the debt had to be enforced through the medium of the Court of Chancery, it became an equitable demand and ceased to be a legal demand. Its character was not altered one whit: it remained a legal demand, and the right of the creditor who came in to prove under an administration decree remained a legal right and the debt which was recoverable was a legal debt: the only difference made was in the remedy by which the debt could be recovered. That being so, the Court of Chancery usually fixed a time within which the creditors could come in and prove their debts; and obvious convenience rendered that necessary, because otherwise the administration would have been hung up for ever. No doubt, as has been pointed out, the language in which the time was fixed was somewhat peremptory; it told people that they would be excluded from the benefit of the decree if they did not come in within the time. But it has long been settled that the language so used was in terrorem only, and that the effect of it was merely this. and nothing more that any creditor who did not come in and prove his debt before the day fixed ran the risk of some of the assets being administered and disposed of by the Court in payment of other creditors; and in that way the fund for the payment of his debt might be imperilled, or if the estate was insolvent he might lose a portion of the dividends which he would otherwise have received.

Then, after referring to (1826 27) 3 Russ 130 (29), his Lordship pointed out that in admitting creditors to come in at any time to take the benefit of the decree the Court is entitled to and does impose certain terms, e. g., costs, etc. He then proceeded as follows (p. 7):

And here a distinction must be drawn. In the very able argument of the appellant at your Lordships' bar he did not always bear in mind the distinction between the case where there is still remaining in Court a residue or a fund legally applicable to the payment of debts, and the case where the whole of the estate has been distributed, and it is necessary in order to obtain payment for the creditor to get back from legatees or others who have been paid, the money which has been paid to them. In the first case the creditor is exercising merely a legal right. In the other he is exercising an equitable right which is given him by the equitable doctrines of the Court of Chancery, because he has no legal right against the legatees: he has no legal right against the residuary legatee; his only legal right is against the executor. But the Court of Chancery, in order to do justice and to avoid the evil of allowing one man to retain what is really and legally applicable to the payment of another man, devised a remedy by which, where the estate had been distributed either out of Court or in Court without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiaries or the next of kin who derive title from the deceased testator or intestate. In that case, no doubt, equitable defences may be made to the claim.

Incidentally I may refer to what Lord Halsbury observed in that case as regards the difficulties which may arise when the whole of the estate is paid away under the orders of the Court before the claimant who has not appeared in time comes in to prove his claim. His Lordship observed as follows (p. 3):

Here there is no doubt about the existence of the debt or of a fund in Court and I have inquired with some interest what authority there is for saying that the Court of Chancery or any other Court, under those circumstances, can refuse to recognize the right of a person who is entitled to have his debt paid out of a particular estate. It is a totally different question where the money has been distributed to legatees or to claimants, and the question is about following the money and endeavouring to get back that which has been already distributed. That case may raise questions of considerable difficulty.

In my opinion, the result of these decisions is, that where there has been a judgment or order in any action for administration of an estate in chancery, the creditors have to come in under the judgment or order, but they are allowed to come in even after a certificate of debts has been made and share in the administration of any assets remaing undistributed or under the control of the Court upon such terms as to costs or otherwise as the Court thinks fit to impose. If a creditor does not come in till after the executor has paid away the residue, or the fund has been distributed, he is not without remedy though he is barred from the benefit of the judgment. If he chooses to sue the legatees and bring back the fund, he may do so: (1833) 1 My & K 200 (3) and (1836) 1 Keen 391 (2); but he cannot affect the executor at all when the distribution has been made under the order of the Court, or after advertisement, in accordance with S. 27, Trustees Act, 1925. If, after individual legatees or creditors have received their dues in full under the sanction of the Court, some funds are still in

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Court, he is entitled to go against such funds even though they are directed to be appropriated to other individual legatees. In such cases, the rule laid down by Lord Eldon in (1826-27) 3 Russ 130 (29) is that the creditor was entitled to receive out of the funds of the legatees so remaining in Court not the whole of the debt but only part of it, bearing the same proportion to the whole as the legacies given to those legatees bore to the whole amount of the legacies given by the will; and that he must seek the payment of the rest of his debt in proper proportions among those legatees who had been actually paid.

Mr. Bilimoria relies upon a passage at p. 899 in Daniel's Chancery Practice (Edn. 8). In my opinion, the law is somewhat loosely stated in that passage and is not justified by the decisions referred to by Daniel in support of it. These decisions are (1826-27) 3 Russ 130 (29), (1833) 1 My & K 200 (3) and (1836) 1 Keen 391 (2). I have referred to the first two. In *Sawyer* v. *Birchmore* (2) the dispute was between some next of kin who had not received their share in the distribution of an intestate's residuary personal estate against other next of kin who had and among whom the estate had been distributed. The defence was that the former had full notice of the administration proceedings and were not entitled to reopen the distribution. This contention was accepted by the Master of the Rolls. This decision, therefore, is no authority for the proposition in the passage in Daniel's, but it is interesting to note how the earlier two decisions in (1826-27) 3 Russ 130 (29) and (1833) 1 My & K 200 (3) were understood by the Master of the Rolls. At p. 401 Lord Langdale observed as follows:

> The rule applicable to cases of this nature, as stated by Lord Eldon in *Gillespie* v. *Alexander* (29) is that a creditor who does not come in till the executor has paid away the residue is not without remedy, though he is barred the benefit of the decree. If he has a mind to sue the legatees, and bring back the fund, he may do so; but he cannot affect the executor at all. In *David* v. *Frowd* (3), Sir John Leach determined that the next of kin, who had made no claim till after the fund was distributed, might maintain a suit to compel those who had been found next of kin, and had received distribution, to refund.

Mr. Bilimoria also relies upon a passage at p. 1271 in Williams. The authority there relied upon is a passage in Storey on Equity Pleadings, Ch. 4, p. 116, which deals with the topic of proper parties to a Bill. Both the passages purport to be based on (1826-27) 3 Russ 130 (29) and (1833) 1 My & K 200 (3), with which I have already dealt. Upon the whole, therefore, I have reached the conclusion that the suit is not maintainable. There only remains the claim made by the plaintiff against defendants 10, as to which Mr. Bilimoria says that the fund was in Court and subject to the orders of the Court under the consent order taken by him against this defendant. There is more than one answer to this claim. In the first place the plaintiff's claim is not made under an administration decree, but in a subtantive suit which, I have held, does not lie. Secondly, the plaintiff is precluded from asserting a claim of this kind which, as I have said, is purely an equitable claim, for an equitable relief, by reason of his laches and gross delay in the assertion of it; and, thirdly, the suit is barred by the law of limitation. That contention, therefore, must be rejected. In the result, the suit must be dismissed with costs. I have heard counsel on the question of costs, and I see no reason why I should depart from the usual rule that when several persons are joined as defendants in one action, where, though the defence may be more or less common, the interest of each defendant is confined to himself, they are entitled to separate sets of costs. That being the case, I think I must order five separate sets of costs as follows: (1) to defendants 1, 2, 3 and 6; (2) to defendant (4); (3) to defendant 5; (4) to defendant 7; (5) to defendant 10. The security brought in by defendant 10 under the order dated 7th January 1932, to be returned to him, and the prothonotary directed accordingly.

B.D./R.K. *Suit dismissed.*

A. I. R. 1936 Bombay 442

BROOMFIELD AND TYABJI, JJ.

Manekbai Nadirshaw Vachha—Plaintiff—Appellant.

v.

Nadirshaw Jamshedji Vachha—Defendant—Respondent.

First Appeal No. 164 of 1935, Decided on 20th February 1936, from decision of B. J. Wadia, J., in Suit No. 5 of 1927.

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(a) Parsi Marriage and Divorce Act (15 of 1865), S. 34—Permanent alimony granted after dissolution of marriage—Alimony not secured by execution of deed or otherwise of husband's property — Court has inherent power to vary it on general principles or good cause shown, e. g. re-marriage.

When the permanent alimony awarded after the dissolution of marriage is not secured as provided for in S. 34, and there is a personal order on the husband to pay it in periodical amounts to wife, it would be proper to reduce or increase it on good cause shown, e. g. re-marriage of parties, and to reserve the liberty to apply for variation of the order. It is not unreasonable to hold that the liberty to apply may be implied. The Court has inherent power to vary it on general principles: 24 *Bom* 465, *Disting.*; 1931 *P C* 234, *Ref.*; *English Law* and *Case Law Discussed.* [P 445 C 2]

It is doubtful whether the power to order the husband to make payments to his wife by way of permanent alimony without the payments being secured on the husband's property is conferred on the Court by Act 15 of 1865 or can be deduced from its provisions. It is further doubtful as to whether there is any inherent jurisdiction under which such a power may be exercised. [P 445 C 1]

(b) Parsi Marriage and Divorce Act (15 of 1865), Ss. 33 to 35—Scope.

Sections 33, 34 and 35 of the Act apply both to decrees for dissolution and to decrees for judicial separation. [P 444 C 1]

Jamshed Kanga and *Pochaji Jamshedji*—for Appellant.

H. D. Banaji—for Respondent.

Broomfield, J.—This is an appeal under S. 42, Parsi Marriage and Divorce Act 15 of 1865, from an order of B. J. Wadia, J. sitting in chambers as Judge of the Parsi Chief Matrimonial Court, Bombay, reducing the amount of permanent alimony awarded to appellant from Rs. 85 to Rs. 50 per mensem. The parties were married in 1915. In November 1927, the appellant brought a suit under the Act for dissolution of her marriage with the respondent on the ground of adultery. The case was tried by Davar, J. and 11 delegates, and a decree for dissolution of the marriage was made on 31st January 1928. On 6th July 1928, Davar, J. sitting in chambers made an order that the respondent should pay the appellant Rs. 85 per mensem as permanent alimony from 1st February 1928. Subsequently both parties re-married and on 6th March 1935, the respondent took out a chamber summons before B. J. Wadia, J., upon which the amount of monthly payment was reduced as stated above. The main question in this appeal is whether the learned Judge had any authority to vary the order of his predecessor. This by itself is a fairly simple question, but the appeal raises incidentally a question of considerable difficulty in connection with the practice of the Parsi Chief Matrimonial Court, Bombay. The difficulty arises from the form of the original order. The only sections in the Act dealing with alimony are Ss. 33, 34 and 35. S. 33 deals with alimony pendente lite and we are not concerned with that. But it may be noted that it empowers the Court to order the husband to make a monthly or weekly payment to the wife during the suit. S. 34 is in these terms:

> The Court may, if it shall think fit, on any decree for divorce or judicial separation, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum, or such monthly or periodical payments of money for a term not exceeding her life, as, having regard to her own property (if any), her husband's ability, and the conduct of the parties, shall be deemed just, and for that purpose may require a proper instrument to be executed by all necessary parties, and suspend the pronouncing of its decree until such instrument shall have been duly executed.
>
> In case any such order shall not be obeyed by the husband, he shall be liable to damages at her suit, and further to be sued by any person supplying her with necessaries during the time of such disobedience, for the price or value of such necessaries.

Section 35 provides that in all cases in which the Courts shall make any decree or order for alimony, it may direct the same to be paid either to the wife herself, or to a trustee, and may impose terms and restrictions. This last section, which corresponds to S. 24, English Matrimonial Causes Act, 1857 does not appear to confer any independent power but only means that any decree or order made under S. 33 or S. 34 may provide for payment direct to the wife or to a trustee on her behalf, and may be made subject to conditions. So far as the express provisions of the Act go at any rate, there is no power to make an order for permanent alimony except under S. 34, and the power there given is to order the husband to secure to the wife a gross sum or monthly or periodical payments. The language is different and, no doubt, intentionally different from that of S. 33 under which a husband may be ordered to pay a monthly or weekly sum.

Now Act 15 of 1865 is largely based on the English Act to which I have just referred, and S. 34 is practically the same as S. 32 of that Act. There are slight dif-

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ferences of wording, but they do not appear to affect the sense materially. The construction which the English Courts have placed on this section is that it conferred no other power except to secure a gross sum or annual sums to the wife by charging the property of the husband; if he had no property, no order could be made; he could not be ordered to make periodical payments out of wages or salary. It was also held that an order of the kind contemplated by the section, viz., an order securing the payment or payments to the wife, could not be afterwards varied, as the intention of the legislature was that it should be permanent: (1865) 4 Sw & Tr 158 (1), (1865) 12 L T 235 (2) and (1882) 7 P D 122 (3); see also 58 I A 350 (4).

Section 32 of the English Act of 1857 applied only to decrees for dissolution of marriage and to the award of permanent alimony, or as the English lawyers call it maintenance, in such cases. Alimony in the case of decrees for judicial separation was dealt with separately in Ss. 17 and 22. The Court was empowered to make such provision for alimony as should be deemed just, and the principles and practice of the Ecclesiastical Courts were to be followed in that connexion. It had been the practice of those Courts in dealing with cases of divorce a *mensa et toro*—they did not pronounce decrees of divorce a vinculo—to order payments to be made by the husband to the wife and to vary such orders when necessary. There are no similar provisions in the Parsi Marriage and Divorce Act. Ss. 33, 34 and 35 of the Act apply both to decrees for dissolution and to decrees for judicial separation.

As it was considered to be a defect in the English Act that a husband who had the means to pay maintenance, though not possessing any property on which the payment could be secured, could not be ordered to pay, the Matrimonial Causes Act of 1866 gave the Court power to order weekly or monthly payments and to discharge, modify or suspend the order should the husband become unable to pay. It is to be noted that the power to vary the order was not given in respect of what I may call the securing order under S. 32 of the Act of 1857 but only in respect of the personal order for monthly or weekly payments, power to make which, in the case of decrees for dissolution of marriage, was conferred for the first time by the Act of 1866. These new provisions were incorporated in the Divorce Act of 1869, but there has been no corresponding amendment of the Parsi Act.

Thus we have this curious position that the only provision in the Parsi Act empowering the Court to grant permanent alimony, in the case of dissolution of marriage and judicial separation alike, is one which has been construed by the English Courts as conferring no power to order the husband to make periodical payments to his wife, unless at any rate the payment is secured by the execution of a deed or otherwise. In the present case however the payment was not secured in any way. Davar, J. made a simple order on the husband to pay Rs. 85 per mensem. We understand that this has been the practice in the Parsi Chief Matrimonial Court for a long time.

In this appeal we are not directly concerned with the question whether the original order of Davar, J. was valid. It was not appealed against and in this appeal there are no cross-objections. Counsel for the respondent has contended indeed that the order was not one which the Court had any power to make under S. 34. But he does so, not with the view of attacking the order itself, but in order to show that the considerations on which it has been held that an order made under the corresponding section of the English Act is permanent and cannot be varied, have no application in the present case. Those considerations apply to orders securing certain payments by a deed or otherwise. The order we are concerned with is a mere personal order to pay. This is undoubtedly a good argument so far as it goes. Whatever view may be taken of the validity of Davar, J.'s order, it is obvious in view of what I have said that the question whether the order can be varied or not cannot depend merely on the construction of S. 34 or the corresponding English section. For instance, a

1. Rawlins v. Rawlins, (1865) 4 Sw & Tr 158=34 L J Mat 147=13 L T 212.
2. Hyde v. Hyde, (1865) 12 L T 235=4 Sw & Tr 80=34 L J Mat 63=13 W R 545.
3. Medley v. Medley, (1882) 7 P D 122=51 L J P 74=30 W R 937.
4. Iswarayya v. Iswarayya, 1931 P C 234=133 I C 716=58 I A 350=54 Mad 774 (P C).

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case like 24 Bom 465 (5), which was referred to in the course of the argument is of no assistance to us. There a husband had been ordered to pay to his wife a certain sum by way of permanent alimony and the payment was secured on his property. Russell, J. expressed the opinion that the order could not be varied. B. J. Wadia, J. in his order in this case says that this was an obiter dictum, and I gather that he dissents from it. But, in view of the authorities to which I have referred, it would seem that Russell, J. was perfectly right. His opinion, however, has no bearing on the present case for he was dealing with a different kind of order altogether.

B. J. Wadia, J. naturally has not considered the question of the validity of Davar J.'s order. No such question was argued before him; and we understand there was little or no argument even on the question whether the Court has power to vary the order. For the reasons which I have indicated I must confess that I feel grave doubts as to whether the power to order a husband to make payments to his wife by way of permanent alimony without the payment being secured on the husband's property is conferred on the Court by Act 15 of 1865 or can be deduced from its provisions. I feel grave doubts also as to whether there is any inherent jurisdiction under which such a power may be exercised. In a previous order, which was cited in the course of the argument (Suit No. 2 of 1929), B. J. Wadia, J. referred to a passage in Halsbury apparently as authority for the proposition that the practice of the English Courts may be applied to Parsis. The cases cited in Halsbury are all decisions of the Ecclesiastical Courts or of the Divorce Courts following the practice of the Ecclesiastical Courts, and they were cases of judicial separation and not dissolution of marriage. But, as counsel for the appellant has shown in his learned and interesting argument, since the decision of the Privy Council in 6 M I A 348 (6) neither the old Supreme Court nor the High Court nor any other Court apart from statute has had any jurisdiction to apply the English Ecclesiastical law or practice to matrimonial disputes between Parsis. If, as we are given to understand, an amendment of Act 15 of 1865 is under contemplation, this is obviously a matter which deserves consideration.

Assuming, however, as I think we must for the purposes of this appeal, that the original order of Davar, J. is a valid order, I have no hesitation in holding that the Court has an inherent power to vary it on general principles. As I have mentioned already, S. 35 of the Act governs all orders for alimony. The Court, therefore, may impose any terms or restrictions which it considers expedient. If alimony is not secured as provided in S. 34, and there is merely a personal order to the husband to pay so much a week or month, it would obviously be proper to provide that the amount might be reduced or increased on good cause shown, and to reserve liberty to apply for a variation of the order. Strictly speaking, perhaps, this should be done in the original order, and we understand that is now the usual practice. But in the case of an order which from its very nature cannot be intended to be immutable, it is not unreasonable to hold that liberty to apply may be implied.

This view, in my opinion, derives substantial support from the decision of the Privy Council in *Iswarayya's case* (4). That was a case under S. 37, Divorce Act 4 of 1869, which contains not only a provision for securing permanent alimony on the property of the husband, but also a provision for a personal order on the husband to pay a monthly or weekly sum, and a proviso under which the order for such payments may be discharged, modified or suspended if the husband should become unable to pay. The question before the Court was whether such an order could be varied in the interest of the wife, i. e., whether the Court could order payment of a larger sum. It was held that the Court had power to vary the order in this way, although the power is not expressly given in the section or elsewhere in the Act, and the principal reason for the decision is given at p. 356 of the report in *Iswarayya's case* (4):

> A power of this nature is, prima facie, not one which ought to be exercisable once and once only; and, unless the wording of the Act is such as to indicate beyond doubt that once the power in favour of the wife has been exercised it is spent and gone for ever, their Lordships think that the section should be construed in such a way as will keep the power on foot.

5. Motibai v. Motibai, (1900) 24 Bom 465=2 Bom L R 602.
6. Ardaseer Cursetjee v. Perozeboye, (1856) 6 M I A 348=4 W R 91 (P C).

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I am of opinion therefore that the order made by B. J. Wadia, J. was within his powers and that there is no substance in the appeal on that ground. Nor, in my opinion, is there any ground for interference on the merits. It is usual and not unreasonable to provide that payments by way of permanent alimony should cease in the event of re-marriage of the wife. That was not done in the present case, but it is a good ground, in my opinion, for reducing the amount of alimony, and I see no reason to differ from B. J. Wadia, J's. view of what is a fair and proper order in the circumstances of the case. In my view, therefore, the appeal should be dismissed with costs.

Tyabji, J.—The parties were married on 15th September 1915, according to the law relating to Parsi marriages. On 21st November 1927, a suit was brought by the wife (the appellant) in the Parsi Chief Matrimonial Court in which the prayers were for divorce or in the alternative for judicial separation, and for alimony. On 31st January 1928, J. D. Davar, J. passed a decree for dissolution of the marriage. J. D. Davar, J. on 6th July 1928, fixed in chambers Rs. 55 per month for alimony pendente lite and Rs. 85 as permanent alimony from 1st February 1928. On 26th December 1934, the plaintiff remarried. The defendant-respondent has also re-married. On 6th March 1935, the defendant took out a chamber summons before B. J. Wadia, J. for reduction of the alimony, and it was reduced to Rs. 50. Two main questions were argued before us, (1) that B. J. Wadia, J. had no power to vary Davar, J.'s order for maintenance, and (2) that assuming he had the power, he exercised his jurisdiction wrongly and the amount of maintenance should not have been reduced.

It is desirable at the start to advert to the distinction observed in England between permanent alimony after judicial separation, and maintenance after dissolution of marriage and divorce. The distinction is one not only of terminology. It is important for reasons affecting the substantive rights of the parties. Historically speaking, the Ecclesiastical Courts in England exercised their Ecclesiastical jurisdiction to separate a husband and wife *a mensa et toro* without divorcing them. After such a judicial separation the parties could lawfully live apart though the marriage tie was not absolutely severed. In such cases the jurisdiction to grant alimony was possessed and exercised by the Ecclesiastical Courts. Since the parties remained husband and wife, the grant of alimony by the Ecclesiastical Courts was merely the enforcement of the right, which the wife had, to be supported by her husband. When in 1859 a new jurisdiction, altogether to dissolve the marriage, was conferred on the Courts in England, the situation was entirely altered. The right that the wife has to be supported by her husband may continue while she continues to be his wife, though they live separate. But rights and liabilities of a new species are involved in an order that the former husband shall continue to maintain and support the former wife after the marriage which made them husband and wife has been dissolved. The question of making provision for the maintenance of the wife after dissolution of the marriage had not arisen before the Ecclesiastical Courts, since the jurisdiction to dissolve the marriage was itself new. The Ecclesiastical Courts had not been concerned with making provision for a woman who had ceased to be a wife: 58 I A 350 (4). The Parsi Marriage and Divorce Act mentions only alimony there is nothing to indicate whether maintenance is or is not intended to be included in alimony. The Parsi Chief Matrimonial Court, whose decree and order are in question, is specially constituted with defined powers under Act 15 of 1865. The preamble of the Act recites the necessity for defining and amending the law relating to marriage and divorce among Parsis, and the expediency of making such law conformable to the customs of the said community. The Act is subdivided under seven heads, which include the following:

"Of Marriages between Parsis", (Ss. 3-14),

"Of Parsi Matrimonial Courts", (Ss. 15-26), and

"Of Matrimonial Suits", (Ss. 27-43).

The first of these three heads contains substantive law relating to requisites to the validity of Parsi marriages and penalties for disregarding them. As regards the constitution and jurisdiction of the Parsi Matrimonial Courts, it is provided that for the purpose of hearing suits under the Act, special Courts shall be constituted: S. 15. The local limits of

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the jurisdiction of the Courts are defined and ancillary matters are provided for. So that the jurisdiction of each such Court is expressly limited (1) in respect of its local limits, and (2) in that its jurisdiction is stated to be for the purpose of hearing suits under the Act. Then follows the part headed "Of Matrimonial Suits," which is thus subdivided: (a) For a decree of nullity (Ss. 27, 28); (b) for a decree of dissolution in case of absence (S. 29); (c) for divorce or judicial separation (Ss. 30-35); (d) for restitution of conjugal rights (Ss. 36-43). The suit before Davar, J., evidently came under sub-division (c) which covers Ss. 30-35. For the present purposes the jurisdiction of the Court therefore to hear suits under the Act (S. 15) has to be considered with reference only to Ss. 30-35. In other words, it may be taken that the Court is specifically constituted for the purpose of hearing suits under Ss. 30-35 and it would seem to follow that the Parsi Chief Matrimonial Court of Bombay has no jurisdiction material to the present case, unless it can be brought under Ss. 30-35. These sections contain provisions relating to suits for having the marriage dissolved and grant of decrees for divorce and for demanding judicial separation. The last three sections under this head (Ss. 33-35) deal with questions relating to alimony.

Of the three sections that I have mentioned, S. 33 refers only to alimony pendente lite. It only authorises the Court to order the husband to pay reasonable sums monthly or weekly during the suit. S. 33 is clearly not relevant. So that only Ss. 34 and 35 are left for consideration. S. 34 empowers the Court on any decree for (a) divorce (after which the parties no more remain husband and wife) or (b) judicial separation: (1) to order that the husband shall secure by a deed to the wife such gross sum or monthly or periodical payments of money as shall be deemed just, and (2) for that purpose to require a proper instrument to be executed, and (3) to suspend the pronouncing of its decree until such an instrument is executed. In case any such order shall not be obeyed, the section provides two remedies: viz. (1) liability to damages at the wife's suit, and (2) liability to a suit by a person supplying her with necessaries. The other section S. 35, authorizes the Court to give directions subserving any decree or order for alimony; it may (1) direct that the alimony shall be paid either to the wife herself or to any trustee on her behalf (2) impose terms or restrictions, and (3) appoint a new trustee. The result material for the present purposes seems to be that the Court constituted for hearing suits under the Act is specifically authorized to make an order, (1) requiring a proper instrument to be executed to secure the sum or payments deemed to be just in accordance with S. 34; (2) in cases in which any decree or order for alimony has been made, to direct that the alimony be paid to the wife herself or a trustee and to impose terms and restrictions: S. 35.

The orders that may be made under these sections may be appreciated from the effect given to similar provisions in England and in particular by the form of instrument adopted for securing the sum or payment. The Matrimonial Causes Act 1857 (20 & 21 Vic. c. 85), Ss. 32 and 24, now the Judicature (Consolidation) Act (15 & 16 Geo V. c. 49), S. 190, sub-ss. (1) and (5) correspond with Ss. 34 and 35 of the Parsi Marriage and Divorce Act. But the background of substantive law in England may be different from that applicable to Parsis; and with regard to Parsis, questions relating to their customs (to which the preamble refers) may have to be determined by evidence as between the parties. Lord Russell in 58 I A 350 (4) desired it to be fully realized that as a general rule an Indian Act does not fall to be construed in the light of statutes enacted by another Legislature; but that the position might be different in the case of an Act like the Divorce Act which makes an express reference to the Court in England to which the relevant jurisdiction of the Ecclesiastical Courts has been transferred, and to the principles and rules on which that Court acts and gives relief. There is no such reference in the Parsi Marriage and Divorce Act. Moreover, unless the substantive law applicable to the Parsis by reason of their customs or otherwise, is exactly in accord with the English law inherited by the Courts in England from the Ecclesiastical Courts, and altered from time to time by statutes in England, the effect of the section would be different in the two cases. The Matrimonial Causes Act, 1857, (20 and 21 Vic, c 85), established in England a new Court of Record and the jurisdiction in matters matrimonial then

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vested in Ecclesiastical Courts in England was transferred to it. The order of Davar, J. dated 6th July 1928, was that the respondent should pay to the appellant Rs. 85 per month as an allowance after their marriage was dissolved. The allowance is called permanent alimony by Davar, J. It is clear that it was not such an order as is authorized by S. 34. It was not an order that an instrument be executed to secure any sum or payment. Lord Russell in 58 I A 350 (4), speaking with reference to a section of which para. 1 is, with slight verbal changes, reproduced in S. 34, Parsi Marriage and Divorce Act, said (p. 357) :

. . . . the Court was given power on a decree for dissolution to order the husband to secure by deed to the wife a gross sum or an annual sum, and to suspend the pronouncing of its decree until the deed had been executed. This provision (which it will be observed took the form of a secured sum) is strictly not alimony, though inaccurately so called in the marginal note to the section, but permanent maintenance. Under that section, there was no power to make any subsequent order. The section, by its terms, pointed to one order in relation to one deed, pending the execution of which the dissolution decree could be suspended.

Lord Russell proceeds to observe that the section was intended to be brought into operation against a husband who had property on which the payment of a gross or annual sum could be secured ; and that it could have no effective operation against a husband who had no such property. The husband without having any such property may be in a position to make a monthly or weekly payment to the wife during their joint lives. But such ability on the part of a husband, who has no such property, would not enable the Court to exercise the power under S. 34 ; the Court could not effectively order him to execute such an instrument as S. 34 contemplates, since the instrument requires the existence of property on which the payment may be secured. In my opinion, Davar J.'s order clearly cannot be brought under S. 34. Nor does S. 35 authorize the making of a decree or order for alimony. It only authorizes directions of the nature I have indicated being given in cases where a decree or order for alimony has been made. No doubt, it is assumed that a decree or order for alimony may be made. But the only decrees or orders having reference to alimony or maintenance that the Act specifically authorizes are : (1) orders for payment during suit, and (2) orders to execute an instrument for securing payments. So that if the authority of the Court to make decrees or orders for alimony is to be confined within the four corners of the Act, then such directions as S. 35 contemplates can be given only where alimony is ordered pendente lite, or the directions may take the form of appropriate provisions in the instrument under S. 34.

I am, in any case, unable to find any express provisions in the Act authorizing such an order as was made by Davar, J.—an order that periodical payments should be made by the husband to the wife after dissolution of marriage. I have already stated that in the examination of the Parsi Marriage and Divorce Act, if any light is to be sought from English decisions, there is necessity for caution, because of the difference in the substantive provisions of the English law and the law applicable to the Parsis. The English law is to be found, I presume, in the precedents and statutes, whereas the Parsi law may have to be derived from the evidence of their customs. But subject to this it is useful to turn to concrete examples of how S. 34 operates in practice. Thus in (1922) 1 Ch 86 (7) the Divorce Court on making a decree absolute for dissolution of marriage, had on 25th November 1907, ordered the husband to secure to the wife annual payments for life. The deed was executed on or about 20th July 1909. 12 years later—on 17th November 1921— a part of the deed was held to be void in view of the prohibitions of the Income-tax Acts, —notwithstanding that the deed was executed in supposed obedience to an order of the Court. It was also found that the deed did not in fact conform to the Court's order and did not carry out the clear intention of the Court though the counsel who settled it believed that he had settled it in strict compliance with the order.

In a considered judgment P. O. Lawrence, J. held that the plaintiff could enforce his right to have the deed put into proper form—by rectification—so as to make it conform to the order and to effectuate the intention of the Court. With reference to making an order for

7. Burroughes v. Abbott, (1922) 1 Ch 86 = 91 L J Ch 157=126 L T 354=38 T L R 167=66 S J 141.

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rectification (which thus became necessary) it was admitted without serious contest that Lawrence, J. sitting in the chancery division had jurisdiction. Yet Lawrence, J. doubted the propriety of his exercising that jurisdiction. As however all the parties were desirous of avoiding expense and delay, Lawrence, J. consulted the President of the Probate, Divorce and Admiralty Division and exercised the jurisdiction, the President having intimated his agreement with that course and his consent, so far as his consent would be useful. From the dates I have mentioned it appears that the deed was dated 20th July 1909, about 18 months after the order to execute it, and it was ordered to be rectified on 17th November 1921. The deed was elaborately drawn providing no doubt for all the contingencies that the conveyancing counsel could foresee. Obviously a deed so elaborately drafted could not be altered from time to time in the same manner as a simple order that fixed sums should be paid periodically. Considerations making orders under S. 34 unalterable do not therefore assist the decision of this case.

It was then argued that Davar, J. could have derived jurisdiction to make the order only under S. 34 ; and that unless it can be brought under that section, it was made without jurisdiction. The question whether Davar, J.'s order was within his jurisdiction does not however arise before us. Neither party can question its validity. The respondent could have, but did not, appeal from it. Moreover, he relied upon it as a valid order when he applied to the Court for a reduction under it. The appellant obviously cannot object that the order in her favour was without jurisdiction. Had the question been open to the parties, it would, it seems to me, have depended on two subsidiary questions : (1) whether by the substantive law applicable to the Parsis an order for payment of periodical payments by way of permanent maintenance can be made against a man in favour of a woman after the marriage between them has been dissolved. If this question is answered in the affirmative, then (2) whether the Parsi Chief Matrimonial Court by its constitution was authorised to exercise jurisdiction in respect of such substantive rights and liabilities.

As it is, I need not express any opinion on the question whether an order by the Parsi Chief Matrimonial Court at Bombay for periodical payments of money by way of permanent maintenance after dissolution of marriage can be justified on any grounds such as that the preamble of the Act refers to the customs of the Parsi community, and that the practice has been to make such orders in a Court in which the customs of the Parsis would be known; and whether the terms of S. 35 contemplate a decree or order for periodical payments by way of permanent maintenance after divorce. As between the parties, it must, it seems to me, be assumed that the Court presided over by Davar, J., had jurisdiction

> to make an order on the husband for payment to the wife of such monthly [or weekly] sums for her maintenance and support as the Court may think reasonable,

and that the jurisdiction was validly exercised by an order being made in chambers. The words in which I have formulated the jurisdiction attributable to the Court are taken from S. 37, Divorce Act, (4 of 1869) which itself is derived from the Matrimonial Causes Act of 1866 (29 and 30 Vic. c. 32. s. 1). The earlier part of S. 37, Divorce Act, corresponds with S. 34, Parsi Marriage and Divorce Act. But the clause, which formulates the authority to order such periodical payments as Davar, J. ordered, does not form part of S. 34, Parsi Marriage and Divorce Act. Nor do the powers expressly conferred on the Parsi Chief Matrimonial Court include—as the examination of Ss. 34 and 35 shows—any powers that may be expressed in terms of that clause. Nevertheless, for the reasons that I have stated, as between the parties to the present appeal, S. 34 must, in my opinion, be read as though such a clause were included in it. The jurisdiction of a Court having power to order periodical payments for maintenance in addition to the power contained in S. 34, Parsi Marriage and Divorce Act, must therefore be considered with reference to the power of modifying orders for periodical payments. It was strenuously argued that judicial orders must, on general principles, be final: that the Court cannot assume jurisdiction to modify orders after they have been made. The position in England prior to 1907 is thus stated by Lord Russell (p. 358) :

> Accordingly, in 1869, the position under the English Acts, in relation to making provision

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for the permanent maintenance of a wife after a dissolution decree stood thus: there was power to order such provision in the form of securing a gross sum or an annual sum; there was a further power to order such provision in the form of ordering payment by the husband of monthly or weekly sums; there was power in the husband to apply for a modification in his favour of this last-mentioned order; there was no power in the wife to apply for any increase in the provision made for her. Such a power was conferred upon the wife for the first time [in England] by the Matrimonial Causes Act, 1907.

The effect of a power in the Court to order periodical payments was explained by Lord Russell on pp. 355-56 in view of general principles. Applying therefore the language of Lord Russell as far as possible to the position with which I conceive that we have to deal, I may say that the power which I must attribute to the Court in this case is a power to make an order on the husband to pay to the wife monthly sums for her maintenance and support. The amount thereof is made to depend upon the Court's opinion of what is reasonable—an opinion which must obviously depend upon facts which may vary from time to time—a power of this nature is prima facie not one which ought to be exercisable once and once only. Lord Russell proceeds (p. 356):

and, unless the wording of the Act is such as to indicate beyond doubt that once the power in favour of the wife has been exercised it is spent and gone for ever, their Lordships think that the section should be construed in such a way as will keep the power on foot.

He next examines the two features of the Act which according to the contention of the then appellant indicated that the power once exercised was spent and gone for ever, and the conclusion is that relevant though the two features were to the appellant's contention, they were insufficient to sustain it. One of these relevant but insufficient features was that while an express proviso for reduction had been inserted in favour of the husband, no similar provision had been inserted in favour of the wife for enhancement. The proviso (to S. 37, Divorce Act) in favour of the husband is to this effect (p. 355):

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court seems fit.

As to this proviso, Lord Russell said (p. 356):

The express proviso, while it may be said to suggest the exclusion of a power to increase in favour of the wife, is certainly not conclusive. Indeed, its insertion in the section might well be accounted for on the following ground: namely, that, but for its presence, it might have been argued that husbands could not be applicants to the Court under a section the sole object of which was to benefit wives.

I must refer here to the observations of Lord Russell on the other branch of the question—alimony after judicial separation—for though we have to deal with maintenance after divorce, one feature is common to the case now before us and to the jurisdiction to grant alimony after judicial separation possessed by the Court in England. In both cases the jurisdiction is derived not under the express wording of a statute, but in England under the old Ecclesiastical law, and in the case before us in the indeterminate manner that I have explained. Lord Russell at p. 360 says:

If it had been intended that the Courts in India, acting under this Act, should not have, in relation to a wife who had obtained a decree for judicial separation, the power which the Court in England enjoyed, of increasing the amount of her permanent alimony as and when the circumstances justified an increase, but that they should be restricted to the making of one order only for permanent alimony, their Lordships feel that this intention would have been declared in express and unequivocal terms.

Lord Russell also points out that since the Indian Divorce Act 4 of 1869 includes alimony after judicial separation and maintenance after divorce, in the same provision, the section may have conferred in 1869 upon the Courts in India a power to increase maintenance, a power which the Court in England did not enjoy until 1907. As the result of the general considerations applicable to a power to order periodical payments their Lordships were of opinion (pp. 356-57)

that upon the true construction of S. 37, where a decree of judicial separation has been obtained by the wife, and the District Judge has made an order on the husband for payment to the wife of a monthly or a weekly sum by way of permanent alimony, there is still power in the Court to make an order or orders for the payment of larger sums by the husband if the circumstances are such as to justify an increase in the amount of the alimony.

This result, I have already stated, was arrived at on the principle that a power to make an order on the husband periodically to pay to the wife sums for her

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maintenance and support,—the amount depending upon the Court's opinion of what is reasonable—an opinion that must depend on facts which may vary from time to time, that a power of this nature is prima facie not one which ought to be exercisable once and once only. And this general principle was held to prevail so as to permit an enhancement in spite of the express statutory provisions in favour of the husband that the amount may be reduced, and in spite of the absence of any such provision in favour of the wife that it may be enhanced. The principle is applicable irrespective of the consideration whether there was a divorce or judicial separation: and irrespective of whether the form of the order provided for a subsequent application for variation of the amount ordered to be paid. It seems to me that the general principle stated by Lord Russell must govern the power authorizing orders for payment of maintenance against the husband, whether the power is derived from the legislature or from custom governing the Parsis or—as in the present case—where the source whence it is to be derived is in doubt and dispute, and the Court must leave the source of the power undetermined, but must proceed on the basis that such a power exists, howsoever derived. This view seems to me to be strengthened by some of the observations based on historical considerations which were made by Lord Russell as being confirmatory of the view formed by their Lordships simply on the true construction of the section corresponding to S. 34, Parsi Marriage and Divorce Act (viz., S. 37, Divorce Act, 1869). Lord Russell in dealing with orders for alimony after judicial separation pointed out that such orders differed from orders for maintenance after divorce in that orders for alimony were made under an old jurisdiction exercised by the Ecclesiastical Courts, but orders for maintenance were made under a new jurisdiction created for the first time in 1857. Under the old jurisdiction for granting alimony after judicial separation (p. 359):

> The Ecclesiastical Courts had and exercised power to order variations in the amount of alimony from time to time, either by way of increase or reduction. 'Where there is a material alteration of circumstances, a change in the rate of alimony may be made. If the faculties are improved, the wife's allowance ought to be increased; and if the husband is *lapsus facullatibus*; the wife's allowance ought to be reduced': (1830) 3 Hagg Ecc R 322 (8).

I need not refer in detail to the decisions on which Sir Jamshed Kanga relied. Their effect is stated in Lord Russell's observations which I have cited so fully. I have cited them to preclude misapprehension. The Court cannot be lightly assumed to have powers of modifying its final orders. These particular orders (even though made in a form of seeming finality) have in themselves elements of periodicity and liability to reduction and enhancement. It is only necessary to refer to the inferences counsel wishes us to draw from the authorities. His argument shortly was that, (1) the powers of the Chief Matrimonial Court are strictly confined within the terms of the Act, (2) that the Court has no jurisdiction beyond that conferred on it by the Act, (3) that, therefore, the order of Davar, J. (since as between the parties its validity cannot be questioned) must be brought within the terms of the Act, (4) that the order can be brought only under S. 34, and (5) that S. 34 authorizes only one order which cannot be subsequently altered. The first two heads of this argument seem at first sight incontrovertible: the Court can have only the powers conferred on it by the Act constituting it. It cannot arrogate to itself any other powers. But the proposition is sought to be applied in a manner which loads it with the whole of the substantive law. The argument addressed to us on the basis of these propositions involves an assertion that it is not proper first to turn to the Act for determining whether the jurisdiction to deal with questions relating to alimony and maintenance is conferred on the Court, and if so, then in the second place, to adjudicate upon the questions over which it has jurisdiction in accordance with the substantive law. The Act, it is true, contains provisions of both kinds, substantive as well as adjective. But that is no ground for assuming against the clear indications of the Act, that because S. 34 provides for the case where the husband has property on which the payment of a gross or annual sum may be secured, therefore in no other case and in no other manner can the husband be held liable for providing alimony or maintenance. Whether under the substantive law there are any such

8. De Blaquiere v. De Blaquiere, (1830) 3 Hagg Ecc R 322.

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ghts and liabilities as are claimed in espect of maintenance and alimony, must e determined by the Court having jurisiction over the matter; what the substantive law is in respect of these rights must be determined no doubt consistently with the Act, but not on the basis that the Act itself contains the whole of that law.

It is argued that the Parsis are governed by the English law under the terms of the Acts applicable to them in Bombay, and that the English law as applicable to them must be the law prevailing in England before 1774; that obviously the statute of 1907 could not be deemed to be a part of that English law by which the Parsis are by the operation of the Indian statute passed in the middle of the previous century deemed to be governed. This (it is argued) must be the more so with reference to a statute like that of 1907, under which for the first time a new power—the power to increase the amount of permanent maintenance ordered to be paid on a decree for dissolution, was conferred on the Matrimonial Courts established in England 50 years before—in 1857; that consequently the jurisdiction to alter the order of maintenance, once it has been made, is not conferred upon the Parsi Matrimonial Court.

The jurisdiction of the Parsi Chief Matrimonial Court must no doubt be confined to matters falling within the terms of the Act constituting it, in the sense that it cannot exercise jurisdiction in respect of any matters with which it is not authorized to deal. But the substantive law delivered to that Court by the Sovereign—I am using the language that Sir Erskine Perry, C. J. used in 1847—for guidance as to the manner in which the jurisdiction conferred on it should be exercised is quite a distinct question. There is not only nothing to show that the Act is exhaustive in respect of the substantive law: the indications are the other way. The argument for the appellant also overlooks the facts some of which are adverted to by Lord Russell: (1) that the Ecclesiastical Courts had and they exercised the jurisdiction of granting permanent alimony after judicial separation, (2) that the question relating to maintenance after dissolution of marriage stands on a totally different footing from alimony after judicial separation, equally in regard to the substantive law, in regard to the jurisdiction of the Court and in regard to the historical development in England; and (3) that the Parsi Marriage and Divorce Act deals with the two situations that arise after divorce and after judicial separation in the same sections and in the same terms, in terms which would be appropriate if the two situations had always been the same so far as the Parsis were concerned, both in regard to the substantive law and in the procedure to be followed for enforcing the rights relating to them. So far as England is concerned the jurisdiction to grant alimony was inherited by the Divorce Courts when they were created; and the jurisdiction was new with reference to maintenance after divorce, the power to divorce being itself a new jurisdiction created by statute. This development of jurisdiction between 1857 and 1907 in regard to grant of maintenance after divorce till it came abreast of the jurisdiction to grant alimony after judicial separation, is a matter in regard to which the Parsi law had no necessary parallel with the English law. The Parsi substantive law (in India) must stand on its own statutory provisions and the customs of the Parsis.

In short the attempt to strangle the respondent's case by subjecting orders for maintenance to the rigidity of S 34 fails, because it cannot be assumed that such orders may not find an avenue for themselves in the substantive law of the Parsis without traversing S. 34. When an application is made to the Court that an order for periodical payments of money be made, the Court, (after satisfying itself that its constitution permits it to deal with the question at all) must turn to the substantive law for determining whether such an order as is prayed for ought to be made in the particular case. Lord Russell deduces from the very nature of orders for periodical payments by way of maintenance that the jurisdiction to make them is of such a nature that it ought not to be exercisable once and once only: in the absence of express provisions to the contrary, if the Court has the power to order such periodical payments, it must have the power to vary the orders from time to time. Since as between the parties it must be assumed that the Parsi Chief Matrimonial Court had power to order payments of periodical sums by way of permanent maintenance by the respon-

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dent whose marriage had been dissolved, therefore it must, in my opinion, be assumed that the Court had power also from time to time to increase or decrease the amount so ordered to be periodically paid. If the power to reduce the amount existed in the Court, then no reason has been shown to us for interfering with the learned Judge's exercise of his jurisdiction. In my opinion the appeal ought to be dismissed with costs.

A.L./R.K. *Appeal dismissed.*

A. I. R. 1936 Bombay 453

BROOMFIELD AND WASSOODEW, JJ.

Nhanesaheb Ahmedsaheb, In re.

Criminal Revn. No. 113 of 1936, Decided on 9th July 1936, against order of Sess. Judge, Ratnagiri.

Criminal P. C. (1898), S. 197—Chairman of District School Board constitued under Bombay Primary Education Act, is public servant not removable from office without sanction of Government—He cannot be prosecuted for offence committed by him in discharge of his official duty without previous sanction of Local Government under S. 197.

The Chairman of a District School Board constituted under the Bombay Primary Education Act, is a public servant not removable from his office save by or with the sanction of the Local Government. He cannot therefore be prosecuted for any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, without the previous sanction of the Local Government under S. 197, Criminal P. C. [P 453 C 1; P 455 C 1]

A. A. Adarkar—for Applicant.
G. B. Chitale—for Opponent.

Broomfield, J.—The question in this case is whether the Chairman of a District School Board is a public servant not removable from office save by or with the sanction of Government, so that he cannot be prosecuted for any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty without the previous sanction of the Local Government under S. 197, Criminal P. C.

The facts may be very briefly stated. The petitioner is a member and the respondent is the Chairman of the District School Board, Ratnagiri, constituted under the Bombay Primary Education Act, (Bom. IV of 1923). There was a meeting of the Board on 22nd February 1935, at which certain business was transacted, and the minutes were recorded in the minute book and signed by the Chairman. The petitioner lodged a complaint against the Chairman charging him with having forged the minutes and thereby committing an offence under S. 465, I. P. C. An objection was taken that the prosecution was barred by S. 197, Criminal P. C., the sanction of Government not having been obtained. This objection was upheld by the trial Magistrate, who discharged the accused. There was then a revision application to the Sessions Judge. He pointed out that the Magistrate ought not to have discharged the accused, and that his order must be deemed to be a dismissal of the complaint for want of sanction. But on the merits he agreed with the Magistrate that the sanction of Government was required, and he rejected the application. That led to the present application to this Court. Two points arise under S. 197, Criminal P. C., whether the Chairman of the School Board is a public servant as defined in S. 21, Cl. (10), I. P. C., and whether, if so, he is not removable from his office save by or with the sanction of the Local Government. The definition of a" public servant" in S. 21, Cl. (10), is :

> Every officer whose duty it is, as such officer, to take, receive, keep or expend any property . . . . for any secular common purpose of any village, town or district . . . .

I have omitted those parts of the definition which are not necessary for our purposes. Now, the learned advocate, who appears for the petitioner, has conceded that the School Board is authorised to spend money on educational purposes, and that the Board itself will satisfy the requirements of the definition save in this particular that it is not an officer. This admission makes it unnecessary to deal with a considerable part of the very careful discussion of the provisions of the relevant enactments in the judgment of the learned Sessions Judge. The only question before us is whether the Chairman of the Board as such and as an individual member of the Board has the duty to take, receive, keep or expend any property for the secular common purposes of the town or district. The provisions of the Bombay Primary Education Rules,

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1924, to which our attention has mainly been directed, are these: R. 141 provides that a Primary Education Fund shall be maintained by the School Board of each local authority, the fund to be kept in the local branch of the Imperial Bank of India, or in such other Bank or Co-operative Society as may be approved by the Government, or in the Government Treasury. The School Board is also authorised by the same rule to deposit part of the fund in the Post Office Savings Bank or to invest it in Post Office Cash Certificates or in Government Securities. R. 142 is important, and is as follows:

> No payment shall be made from a bank or from the Government Treasury out of the Primary Education Fund except upon a cheque signed by the School Board Administrative Officer and countersigned by the Chairman of the School Board, or in his absence by the Vice-Chairman or other member of the School Board to whom the power of countersigning cheques has been delegated by the Chairman. In the absence of the School Board Administrative Officer or where there is no School Board Administrative Officer, such cheque shall be signed by the Vice-Chairman and countersigned by the Chairman, or in his absence by any member of the School Board other than the Vice-Chairman to whom the power of countersigning has been delegated by the Chairman. Due intimation of the delegation of such power shall be given by the Chairman to the Bank or Government Treasury in which the Primary Education Fund is kept.

Rule 143 provides that the School Board Administrative Officer, who is appointed under S. 9, Bombay Primary Education Act (Bom. 4 of 1923), shall be responsible for the scrutiny of vouchers and bills. R 144 provides that all disbursements shall be made by the Administrative Officer. R. 22 deals with the duties of the Chairman, and provides that he is to:

> (a) Preside at the meetings of the Board; (b) watch over the financial and executive administration of the Board, and (c) in cases of emergency perform such acts as may appear to him to be necessary, provided that the Act and the rules framed thereunder are not thereby contravened. . . . .

The argument on behalf of the petitioner is that signing a cheque is not expending money within the meaning of the definition, and even if it is, the Chairman cannot sign cheques by himself. He only countersigns cheques signed by other persons. Therefore it cannot be said that he takes, receives, keeps or expends any property. As regards R. 23 (b) it is urged, I think rightly, that the duty of watching over the financial and executive administration of the Board would not bring the Chairman within the definition of a public servant. As regards R. 23 (c) the argument is that this is subject to the Act and rules and would not authorise the expenditure of money. It appears to me, however, that as money cannot be drawn out of the bank except on a cheque countersigned by the Chairman, it may be said that he takes part in the act of receiving money when the money is withdrawn by cheque for the purpose of disbursement, and that he takes part in the act of expending money in cases where the payment is made directly by cheque. I am further of opinion that the emergency powers given to the Chairman by R. 23 (c) may reasonably be held to include the power, and, therefore, the duty, in a proper case, to take charge of money or other property, school furniture, libraries, and so on, belonging to the Board. Without any undue straining of language, therefore, I hold that the Chairman of the Board comes within the definition of a "public servant." That being so, it is immaterial, in my opinion, that there is no express provision in the Bombay Primary Education Act corresponding to S. 135, District Local Boards Act, which gives to every member of the Local Board and every officer and servant maintained by or employed under it the status of a "public servant."

The second point is perhaps a little more difficult, namely, the question whether the Chairman is not removable from his office except by or with the sanction of the Local Government. It is provided in R. 13 (a) that the Government, if it thinks fit, on the recommendation of the School Board and of the local authority, and supported by a resolution passed by at least two thirds of the whole number of members of each body, may remove any member elected or appointed to the School Board, if such member has been guilty of misconduct in the discharge of his duties or of any disgraceful conduct in performing his duties as a member. Mr. Adarkar for the petitioner urges that the opponent has not been prosecuted qua member but qua Chairman of the Board. He says, and it is a fact, that there is no provision in the statutes or in the rules for removal of the Chairman of the School Board as such; that is to say,

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there is no provision corresponding to the Bombay Local Boards Act, S. 26 (1), and the Bombay Municipal Boroughs Act, S. 21. Therefore, he says, R. 13 (a) does not stand in his way.

Now, there is, of course, a distinction between the office of Chairman and the office of a member of a Board, and in some cases it may be important. If a man is removable from his office as a Chairman without the sanction of Government, you cannot say that S. 197, Criminal P. C., applies because he is also a member of the Board, and as such member cannot be removed. That was the position in the old case, 2 Weir 226 (1). But that is not the position here. It is not the case that the opponent can be removed from his office of Chairman without the sanction of Government.

On the other hand Mr. Adarkar is not correct when he says that he cannot be removed at all. Rule 21 (2) provides as follows:

> The term of office of the Chairman and Vice-Chairman shall be co-extensive with that of the School Board: provided that, if either of them resigns his office or ceases to be a member of the School Board, a fresh election to fill up the vacancy shall be held; and provided further that, on the expiry of the term of office of a School Board, the Chairman and Vice-Chairman shall continue to perform the current administrative duties of their offices until such time as a new Chairman and Vice-Chairman shall have been duly elected and have taken charge of their duties.

There is no means by which he can be removed from his office of Chairman except under R. 13 (a). But the Chairman is a member, and power to remove any member must include power to remove even the member who is the Chairman. If it were necessary therefore to remove the Chairman of the School Board from his office, it would be necessary to have recourse to R. 13 (a), and there can be no doubt, I think, that he could be removed under that rule. Again, therefore, it can be held without any straining of language that the Chairman of the Board is a public servant, who is not removable from his office save by or with the sanction of the Local Government. The findings of the lower Court are, therefore, in my opinion, correct, and the rule should be discharged.

Wassoodew, J.—The question in this case is whether the Chairman of the District School Board, Ratnagiri, is a public servant not removable from his office save by or with the sanction of the Local Government, and is therefore protected from prosecution for an offence alleged to have been committed by him while acting or purporting to act in the discharge of his duty. My learned brother has dealt extensively with the rules under the Bombay Primary Education Act to show that the duties of the office of the Chairman conform as nearly as possible to the duties required of an officer under S. 21, Cl. (10), Penal Code, to bring him within the definition of a "public servant." There is no statutory provision, as in other Acts constituting local authorities, granting immunity to the members of the District Local Board from prosecution by including them within the definition of "public servant." The status of these members and the Chairman will depend, therefore, on the nature of their statutory duties. I need only refer in that connexion to the provisions of Rule 23 (c), and Rule 142 of the rules framed by Government under the Bombay Primary Education Act. It is clear that under the latter rule the Chairman shares the responsibility for drawing cheques on banks for payments of funds belonging to the Board. Consequently he could be regarded as an officer expending property of the Board for a secular common purpose of the District within the meaning of Cl. (10), S. 21, Penal Code. The emergency powers conferred by R. 23 (c) also mean nothing else than the performance of acts of an executive character. When it is conceded that the executive officer, who is described as an administrative officer, is a public servant within the meaning of S. 21 (10), there is no difficulty in bringing the Chairman within that category. In my opinion, it would make no difference to that position because the Act and the rules specify the duties of the Administrative Officer without reference to the Chairman.

On general principles, when the Act itself provides for the election of a Chairman by the Board from amongst its members, there could be no difficulty in treating him as a representative of the Board participating in the functions which the Board has been constituted to perform. Amongst those functions are the functions which an officer is required to perform under Cl. (10), S. 21 so as to bring him

1. Venkatesalu Naidu v. Heeraman Chetty, (1888) 2 Weir 226.

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within the definition of the term "public servant." Therefore I agree with my learned brother that the Chairman must be regarded as a "public servant." With regard to his liability for removal from office with the sanction of the Local Government, it is sufficient to say that, in the absence of any provision for the removal of the Chairman *qua* Chairman either in the body of the Act or in the rules, the only provision under which his removal can take place is the provision contained in R. 13 (a). Therefore the only way in which the Chairman could be removed from his office is by removing him as a member with the sanction of Government under R. 13 (a). Accordingly the second condition under S. 197, Criminal P. C., has been fulfilled in this case. I, therefore, agree that the rule be discharged.

R.M./R.K. *Rule discharged.*

A. I. R. 1936 Bombay 456

KANIA, J.

Bai Premabai—Plaintiff.

v.

Jivandas Vallabhram and *others* — Defendants.

O. C. J. Suit No. 1641 of 1931, Decided on 29th November 1935.

(a) Execution—Legal representative — Application for execution against deceased judgment debtor pending—Fresh application for execution against representative is not necessary.

Application for execution of the decree against the representatives of the deceased can be made in the pending application for execution against the deceased and it is not necessary to make a fresh application for the purpose. The terms of O. 22, R. 12, Civil P. C., also show that on the death of a judgment-debtor a pending application for execution does not abate: 1931 *Bom* 425, *Rel. on.* [P 457 C 1]

(b) Hindu Law — Debts — Father — Insolvency of father—Son's interest does not vest in Official Assignee—Official Assignee has to take special steps to bind son's interest for father's liability.

Under Hindu law on the insolvency of the father the son's interest does not vest in the Official Assignee. A son is entitled to deal with his interest in spite of the father's insolvency and any alienation made by him would be valid and binding even as against the Official Assignee until the Official Assignee by a proper procedure exercises his right to make the son's interest in the joint family estate liable to satisfy the father's debts. [P 458 C 1]

(c) Civil P. C. (1908), Ss. 50 and 53—Legal representative—Attachment of joint Hindu family property—Holder of property declared insolvent—Death of insolvent — Application for execution of decree against sons of deceased — Effect of insolvency — Undivided sons are legal representatives of their father.

Plaintiff in execution of his money decree attached certain properties belonging to the defendant alleging that it belonged to the defendant and his sons forming joint Hindu family. On objections being raised to the attachment of other properties plaintiff filed a suit to establish his right to attach them. During the pendency of this suit a firm in which defendant was a partner was adjudicated insolvent. Plaintiff alleged that the name of defendant as a partner of the firm was representing the share of the joint family in that firm. Defendant thereafter died. Plaintiff thereafter obtained a decree declaring their right to attach the joint family property. Thereafter the plaintiff under O. 21, R. 22 called upon the Official Assignee and the sons of the deceased to show cause why the decree should not be executed against them. It was contended by the sons that on the insolvency of their father as a partner in the insolvent firm the Official Assignee became the legal representative and hence they could not be brought on record:

Held: that the sons were legal representatives of the deceased within the meaning of Ss. 50 and 53, Civil P. C. and for the purpose of application under O. 21, R. 22. Moreover on the insolvency of the deceased the only property that vested in the Official Assignee was the right, title and interest of the deceased and as under Hindu law they did not vest in the Official Assignee; it was necessary for the sons to be brought on record, who remained the legal representatives of the deceased. [P 459 C 2]

M. C. Setalvad and *J. H. Vakeel* — for Plaintiff.

C. K. Daphtary and *F. J. Coltman* — for Defendants.

Kania, J.—The original plaintiff filed this suit against three defendants, claiming a sum of Rs. 12,000 odd from them. On 26th February 1934, the present plaintiff obtained a decree for Rs. 16,027 8-0 against the three defendants for debt and interest, and costs of the suit. On 10th July 1934, the plaintiff obtained an order in execution of the decree and attached the whole property now in dispute in the execution proceedings. The plaintiff alleges that the property belonged to defendant 1 and his sons who were members of a joint and undivided Hindu family. Objections were raised to other attachments on other pro-

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perties, and on a summons taken out the plaintiff was directed to file suits to establish her right to attach those properties. One such suit was accordingly filed in Thana Court against Mathuradas, one of the sons of Jivandas. Pending these proceedings the firm of Jivandas Vallubhram and Co., in which defendant 1 herein was a partner, were adjudicated insolvents on 12th December 1934. The plaintiff alleges that defendant 1's name in that firm represented the share of the joint family consisting of defendant 1 and his sons. On 29th April 1935, Jivandas, defendant 1, died. After a decree in the Thana suit was passed on 1st July 1935, declaring that the property therein involved was joint family property, the plaintiff made the present application under O. 21, R. 22, Civil P. C., and served it on the Official Assignee and the present respondents calling upon them to show cause why the decree should not be executed against them. The Official Assignee does not appear and contest.

The attachment levied against the property in question on 10th July 1934, still subsists and the application for execution originally filed still remains to be disposed of. The present application for execution of the decree against the representatives of the deceased could be made in the pending application and it is not necessary to make a fresh application for the purpose: see 11 Bom L R 1358 (1) and 33 Bom L R 858 (2). The terms of O. 22, R. 12, Civil P. C., also show that on the death of a judgment-debtor a pending application for execution does not abate. To this extent, therefore, there can be no objection on the part of the respondents. On behalf of the plaintiff it is contended that the terms of S. 50, Civil P. C., read along with S. 53, show that the opposing respondents are, for the purpose of this application, legal representatives, provided it is shown on evidence that there is property in their hands which is liable for payment of the decretal amount, as it is not disputed that the opposing respondents are the sons of Jivandas. It is urged on behalf of the plaintiff that the definition of "legal representative" as contained in S. 2, sub-s. (11), is not exhaustive and should be qualified by S. 53. On behalf of the respondents it is contended, on the other hand, that on the insolvency of Jivandas the Official Assignee became his legal representative and on the death of Jivandas, therefore, it is not necessary to bring the respondents on record. It is contended that just as during Jivandas's lifetime the plaintiff could have executed the decree against the joint family property, if any, in the hands of the present respondents, even after Jivandas's death the plaintiff would be entitled to do so without making the respondents parties as legal representatives. On behalf of the respondents strong reliance is placed in this connexion on the decisions in 7 Bom 438 (3) and 42 Bom 504 (4). It is, therefore, necessary to consider the following sections of the Civil Procedure Code. S. 2 (11):

'Legal representative' is a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;

Section 50:

(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed the decree to execute the same against the legal representative of the deceased. (2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

Section 53:

For the purpose of S. 50 and S. 52 property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

In my opinion the contention of the plaintiff is correct. The terms of S. 53 themselves indicate that the property in the hands of the son or descendant should be deemed to be the property of the deceased come to the hands of the descendant as his legal representative. In

1. Purushottam v. Rajbai, (1909) 34 Bom 142=4 I C 839=11 Bom 1358.
2. Shankar v. Hiralal, 1931 Bom 425=134 I C 730=33 Bom L R 858.
3. Fakirchand Motichand v. Motichand Hurrukchand, (1883) 7 Bom 438.
4. Chunilal Harilal v. Bai Mani, 1918 Bom 165=46 I C 745=42 Bom 504=20 Bom L R 660.

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view of the express words "as his legal representative" used in S. 53, it will be contradictory to state that although the property in his hands is to be considered as property held by him as legal representative, he was not a legal representative within the meaning of S. 50 or O. 21, R. 22, Civil P. C. Reading the above provisions of the Code together it seems that the legislature had defined the ordinary meaning of the term "legal representative" in S. 2, sub-s. (11), but, having regard to the peculiar provisions of Hindu law under which a son or descendant is liable to satisfy the debt of his father or ancestor out of the joint family property, and having regard to the pious obligation of the son or descendant to discharge the father's or ancestor's debt out of the joint family property and further having regard to the right of the creditor to proceed against such property although the sons were not joined as party defendants to the original suit, S. 53 was specially introduced to obviate the necessity of filing a fresh suit to enforce the creditor's rights. Having regard to the provisions it would not be open to the creditor to file a suit against the sons because the liability of the property in the hands of the sons to be attached will be a question arising in execution and the terms of S. 47 of the Code would bar an independent suit. Apart from the construction of the words of the above sections it is also clear that under Hindu law on the insolvency of the father the sons' interest does not vest in the Official Assignee. A son is entitled to deal with his interest in spite of the father's insolvency and any alienation made by him would be valid and binding even as against the Official Assignee until the Official Assignee by a proper procedure exercised his right to make the son's interest in the joint family estate liable to satisfy the father's debts: 52 I A 22 (5), 1934 Mad 217 (6) and 48 All 343 (7).

On behalf of the respondents it is not contended that on the insolvency of Jivandas the sons' interest became vested in the Official Assignee. It is suggested that the right of the father to dispose of the sons' interest in the joint family estate became vested on insolvency in the Official Assignee. That proposition is distinctly negatived by the Privy Council decision in 52 I A 22 (5). Their Lordships clearly decided in that case that this right, not being property within the meaning of the Presidency-towns Insolvency Act, did not vest in the Official Assignee, but he could make that right available to him by adopting proper procedure. The fact that the property was attached before the insolvency and the death of Jivandas does not make any difference in the position of the respondents as regards the present application. Just as during the lifetime of Jivandas the respondents could not have dealt with their interest in the joint family estate, so as to defeat the present attachment, they could not even now do so, in spite of the insolvency and death of their father. That, however, does not alter their liability to be made respondents in the present application under S. 53 of the Code. Moreover, if even after the sale proceeds of the property in question are credited against the decree, there was a deficit, the plaintiff would be entitled to proceed against any other property which may be in the hands of the respondents to satisfy her decree. That property would be in their hands, according to the terms of S. 53, as the legal representatives of Jivandas. According to the decisions the Official Assignee only represents the individual interest of the deceased Jivandas and the attachment only of his right, title and interest in the property would be ineffective against the Official Assignee. The interest of the sons in the particular property not being vested in the Official Assignee, the only parties who could dispute the validity of the attachment or the right of the attaching creditor to dispose of the same would be the opposing respondents and no others. Therefore, in my opinion, along with the Official Assignee, they are the legal representatives of the deceased, Jivandas, for the application under O. 21, R. 22.

The decision in 42 Bom 504 (4) was on different facts, as the decree was not for a debt. The learned Judges have expressly noticed the difference which may arise in the event of there being a decree for debt and the application in that event of S. 53, Civil P. C. The authority of the

5. Sat Narain v. Behari Lal, 1925 P C 18=84 I C 883=52 I A 22=6 Lah 1 (P C).
6. Official Receiver v. Arunachalam, 1934 Mad 217=148 I C 787=66 M L J 412.
7. Allahabad Bank, Ltd., Bareilly v. Bhagwan Das Johari, 1926 All 262=92 I C 309=48 All 343=24 A L J 323.

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general observations in that case as to the meaning of "legal representatives" is considerably shaken by the doubt cast thereon in 55 Bom 709 (8). The judgment in the former case was distinguished although that also was not a case of a decree on a debt, but like the decision in 42 Bom 504 (4) was to enforce a decree granting an injunction.

The learned counsel for the respondents very strongly relied on the observations in 7 Bom 438 (3). There a father and a son were joint and the father was adjudicated insolvent. The father died and the Official Assignee sold the whole property. It was held that he was entitled to do so. In that case it was further held that under the Insolvency Act, by reason of the vesting order, the right of the father to dispose of his sons' interest in the ancestral immoveable estate was also vested in the Official Assignee, and therefore he could give a good title to the purchaser. It was further held that the death of the insolvent had no effect on the proceedings in his insolvency or on the powers of the Official Assignee, as the ancestral estate previously vested in the Official Assignee was not thereby divested and got vested in the son by right of survivorship. It was observed that in the legal aspect of the matter the natural existence of the insolvent was, for the purpose of dealing with his estate, artificially continued in the Official Assignee, who could after the insolvent's death deal with the estate as he could have dealt with it had the insolvent been then alive. It is on the last observations that the learned counsel for the respondent strongly relies. In view of the Privy Council decision in 52 I A 22 (5) the two propositions laid down in that case, that the father's right to dispose of the property was vested in the Official Assignee and therefore he could dispose of the property even after the death of the insolvent father, cannot now be sustained. The further corollary to that proposition is contained in the observations relied upon by the learned counsel for the respondent. In my opinion those observations are to be read along with the two propositions on which the learned Judge based his decision, and under the circumstances they do not now help the respondents. Having regard to the Privy Council decision it is clear that on the insolvency of Jivandas the only property vested in the Official Assignee was the right, title and interest of the deceased, and the sons' right, title and interest in the joint family estate did not become vested in him, although by adopting proper proceedings the Official Assignee could, for the benefit of the creditors of the insolvent father, avail of the interest of the sons in the joint family estate. Till that was done, the sons had a free hand and could deal with their own shares, and creditors of the sons who may have obtained decrees against them or persons who were entitled in law to attach their interest in execution of their decrees had a perfect right to do so.

8. Ganesh Sakharam v. Narayan Shivram, 1931 Bom 484=134 I C 961=33 Bom L R 1144=55 Bom 709.

It is therefore clear that the son's interest not being vested in the Official Assignee, the Official Assignee does not represent that portion of the estate, and by bringing him on record the son's interests are not represented in these execution proceedings. For that purpose it is necessary to bring the sons on record and the Court would inquire whether the property in their hands was liable to satisfy the decree having regard to S. 50, sub-s. (2), read along with S. 53. For the purpose of that inquiry it is clear that the sons are the legal representatives. They would therefore be proper respondents to the present application, subject to proof of their having such property in their hands. The contentions of the respondents therefore on an argument of law fails. Their liability to be joined as respondents or legal representatives would depend upon a question of fact whether they hold any property as mentioned in S. 53. That question of fact is disputed and evidence will have to be adduced to prove that.

B.D./R.K. *Order accordingly.*

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* A. I. R. 1936 Bombay 459

B. J. WADIA, J.

Krishnadas Tulsidas and *another*—Plaintiffs.

v.

Dwarkadas Kaliandas and *others*—Defendants.

O. C. J. Suit No. 1909 of 1935, Decided on 10th January 1936.

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⁕ (a) Succession Act (1925), Ss. 97, 105 and 106—S 97 does not apply to Hindu wills —Illus. (ii) to S. 105 cannot be construed according to rule of construction in S 97—In construing Hindu wills ordinary notions and wishes of Hindus with respect to devolution of property should be considered—Hindu will giving legacy to '*A* and his sons and daughter' —*A* and daughter dying before testator — Legacy held was for parent and issue concurrently and sons took whole legacy under S. 106.

Section 97 does not apply in construing a Hindu will. Illus. (ii) to S. 105 cannot be construed according to the principle of construction laid down in S. 97, because an illustration ordinarily exemplifies the particular section to which it is appended and the Court cannot import into an illustration to one section which is applicable to Hindu wills a substantive proposition of law or a rule of construction embodied in another section which is not so applicable. S. 105, has been made applicable to Hindus as the section is of general application. There may be instances where a legacy is given to *A*, a Hindu alone, and if in such a case *A* predeceased the testator, the legacy would lapse. But from that it does not follow that Illus. (ii) will apply, if the bequest is contained in a will made by a Hindu. [P 461 C 2; P 462 C 1, 2]

In construing Hindu wills it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. [P 463 C 2]

Where a Hindu will gave legacy to '*A* and his sons and daughter,' and *A* and the daughter died before the testator :

Held: that the legacy was for parent and issue concurrently and the sons as survivors took the whole legacy under S. 106: 2 *I A* 7 (*P C*), *Rel on.* [P 464 C 2]

(b) Will—Construction—Intention of testator as expressed in language of will should be given effect to.

It is always the intention of the testator as expressed or implied in the language of the will which must be given effect to so far and as nearly as may be done consistently with the law. That intention must be collected with reasonable certainty, and it may be collected from the entire clause or if necessary, from the whole will itself. [P 463 C 1]

(c) Will—Construction — Words used by testator should be taken in their plain and appropriate usual sense and not in legal and technical sense—Onus of proving that they have not such meaning lies on those who attribute other sense.

Unless it is clear to the Court that the testator intended to use particular words in their legal and technical sense, the only proper way to construe them is to take them in their plain and appropriate usual sense. In order to deprive them of such sense there must be a sufficient indication to satisfy the Court that the words were meant to be used by the testator in some other sense and the burden of proof in such cases lies on those who attribute to those words such other sense. [P 464 C 1, 2]

V. F. Taraporewala and *Jamshed Kanga*—for Plaintiffs.

M. C. Setalvad—for Defendants 3 to 6.

Judgment.—Plaintiffs have taken out this originating summons for the construction of a portion of Cl. 5 of the will of one Ranchoddas Tribhowandas Modi, relating to the payment of a legacy of Rs 10,000. The legacy was to be paid to "Bhai Tulsidas Keshavdas and (his) sons and daughter". Plaintiffs are the sons of Tulsidas. The will was made in 1914, and at that date the only children of Tulsidas who were in existence were his two sons, the plaintiffs, and one daughter Kusumbai. Tulsidas died in 1914, and Kusumbai died in 1924. The testator died at Bombay on or about 10th May 1930. Plaintiffs contend that the legacy was given jointly to Tulsidas and his sons and daughter, and that Tulsidas and Kusumbai being both dead, they are entitled to the entire legacy.

Defendants 1, 2 and 3 are three of the proving executors of the will. In 1930 a suit was filed by Jugmohandas Kaliandas against the executors of the will for the administration of the estate of Ranchhoddas Modi, being Suit No. 1889 of 1930, and a consent decree in the suit was passed on 7th October 1931, by which it was declared that the widow of the deceased testator, Putlibai, was entitled, as the residuary legatee, to her husband's estate, subject to the payment inter alia of the legacies under his will. The estate was accordingly handed over to her. Thereafter Putlibai died in 1932, leaving a will of which defendants 3 to 6 are the executors. Probate of her will was granted to them on 2nd October 1933. Defendants 1 and 2 are agreeable to the payment of the legacy of Rs. 10,000 to the plaintiffs. Defendants 3 to 6 contend that on the death of Tulsidas in the lifetime of the testator the legacy lapsed and formed part of the residue. They deny that the legacy was given jointly as alleged, and submit that the plaintiffs are not entitled to it.

The will of Ranchhoddas Modi, is in the Gujarati writing. There is some dispute between the parties as to the correctness of the translation of the particular portion of Cl. 5 which is under consideration. In the petition for probate of the will the translation was as follows: "Rs. 10,000 to Bhai Tulsidas Keshavdas

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and sons and daughters," and that was also the translation of the clause contained in the will annexed to the probate which was granted on 5th October 1931. Subsequently, that is after the probate was granted, but before the originating summons was taken out, the translation was corrected by the Court translator at the instance of the plaintiffs' attorneys into "Rs. 10,000 to Bhai Tulsidas Keshavdas and sons and daughter." On consulting one of the senior Gujarati translators of this Court I was informed that the Gujarati word used by the testator for "daughter" can be translated both in the singular and in the plural, that is both as "daughter" as well as "daughters." The word is translated in the singular in setting out Cl. 5 in para. 2 of the plaint, and in the affidavit of defendant 4 on the originating summons para. 2 of the plaint is admitted, which means that the translation of the word in the singular as "daughter" is accepted as correct. Counsel for defendants 3 to 6, however, said that this was by mistake. It may be mentioned here that as a matter of fact Tulsidas had only one daughter at the date of the will, and never had another. The only question, therefore, is, what is the correct and proper construction of the words of the legacy? It is the will of a Hindu testator, and was drawn, as the Court was informed, by the testator himself. It is provided by S. 97, Succession Act of 1925 (which corresponds to S. 84 of the Act of 1865) that:

> Where property is bequeathed to a person, and words are added which describe a class of persons but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will.

According to the first illustration to that section, if a bequest is made, for instance, "to *A* and his children," or "to *A* and his heirs," or "to *A* and his issue," '*A*' will take the whole interest which the testator had in the property which is the subject matter of the bequest. That would be so in accordance with a rule of the English law regarding bequests of personalty, viz., that where there is a gift to '*A*' and his heirs, or to '*A*' and the heirs of his body, the words "and his heirs" or "and the heirs of his body" are to be construed as words of limitation of the gift to *A*, that is, as words which describe the nature and extent of the interest conferred on *A*. The heir or heirs of the body do not take by purchase, unless the testator has so intended by his will. On the other hand, if a bequest is made "to *A* and his brothers," as in Illus. 2 to S. 97, *A* and his brothers are jointly entitled to the legacy. They will take it jointly, because a bequest to *A's* brothers along with *A* does not enlarge the estate of *A*. If S. 97 was applicable in this case, Tulsidas would take the entire interest in the legacy for himself absolutely. But it is provided by S. 57 of the Act of 1925, read along with Sch. 3 to the Act, that S 97 does not apply to wills made by Hindus. It applies, for instance, in the case of Parsis. In 47 Bom 349 (1), a Parsi lady settled some property on herself for life and then for her son for life, and then for "his sons and their male heirs absolutely in equal shares as tenants in common." It was held that the words "male heirs" did not imply any limitation, and that the son's sons, that is the grandsons, took the property absolutely as tenants in common. It was held that if S. 84 (now S. 97) was applicable to wills, there was no reason why a different effect should be given to the expression "male heirs" in a deed of settlement. This was confirmed by the Privy Council in 1925 P C 306 (2). Counsel for defendants 3 to 6, however, relied on S. 105, Succession Act which deals with a case in which the legacy lapses, and principally on Illus. (ii) to that section. Illus. (ii) runs as follows:

> A bequest is made to *A* and his children. *A* dies before the testator, or happens to be dead when the will is made. The legacy to *A* and his children lapses.

I have already referred to Sch. 3 to the Act before. It enumerates the sections of the Act which are applicable to the wills of Hindus, and S. 105 is one of them. It also mentions certain "restrictions and modifications" in the application of those sections, and in Cl. 5 of those "restrictions and modifications" it is stated that in applying certain sections, including S. 105, the words "son," "sons," "child" and "children" shall be deemed to include an adopted child. It was argued that as S. 105 was applicable to

1. Dadabhoy Framjee v. Cowasji Dorabji, 1923 Bom 177=77 I C 83=47 Bom 349=24 Bom L R 1111.
2. Dadabhoy Framji v. Cowasji Dorabji, 1925 P C 306=94 I C 535 (PC).

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wills made by Hindus, and as the word "children" occurs only in Illus. 2 to that section, the illustration must be taken as laying down a rule of construction which applies to wills made by Hindus. I do not agree with this contention. It is true that an illustration to a section, unlike marginal note, is considered as a part of the section itself, and is to be accepted as being both relevant and valuable for the construction of the section: see 43 I A 256 (3) and 55 Cal 154 (4). But an illustration ordinarily exemplifies the particular section to which it is appended, and the Court cannot import into an illustration to one section which is applicable to Hindu wills a substantive proposition of law or a rule of construction embodied in another section which is not so applicable. If the bequest to *A* and his children in Illus. (ii) to S. 105 is to be construed according to the rule of construction laid down in S. 97, *A* will no doubt take the entire interest which the testator had in the property, and in the event of *A* dying in the lifetime of the testator the legacy will fail to take effect and fall into the residue.

But a bequest in a will to *A* and his children, or to *A* and his sons and daughters, cannot be construed according to S. 97, if the will is made by a Hindu, nor can the added words "and his children" or "and his sons and daughters" in a will made by a Hindu be rejected as mere surplusage having no effect, in the absence of any indication of a contrary intention in the will itself. I do not think the word "children" is different in meaning from the words "sons and daughters" for "children" include both : see 20 Bom 571 (5), where it was held that a bequest to children does not mean a bequest to sons only. S. 105 of the Act has been made applicable to Hindus as the section is one of general application. There may be instances where a legacy is given to *A*, a Hindu, alone, and if in such a case *A* predeceased the testator, the legacy would lapse. But from that it does not follow that Illus. (ii) will apply, if the bequest is contained in a will made by a Hindu. To say so would be inconsistent with the rule of construction laid down in S. 97 which the Legislature has expressly made inapplicable to such wills.

It was argued that if S. 97 did not apply to wills made by Hindus, its principle should be made applicable to such wills. Counsel referred to Trevelyan on Hindu Wills, Edn. 2, p. 86, where the author says that the principle of S. 84 (now S. 97) applies to Hindu wills; on what grounds, he does not say. It was argued that there was nothing in the rule of construction contained in the section which was repugnant to notices of Hindu law. But the provision of the Legislature is clear. S. 97 embodies an artificial rule of construction of wills taken from the English law, and it is expressly provided that that section, which, I take it, means the rule of construction contained in it, does not apply to wills made by Hindus. In a case which went up to the Privy Council, 40 I A 105 (6), there was a bequest to the testator's eldest son Thomas Brown Skinner, "and to his lawful male children according to the law of inheritance," and in the event of Thomas dying without lawful male children, to the testator's next male heir, and in default to the female children. Here the testator, Thomas Skinner, was not a Hindu. Still it was held that English rules of interpretation, in so far as these are artificial rules of construction which have arisen in the administration of English Courts of Equity, should not be allowed to govern the interpretation of a will made in India in 1864, that is, before the Act of 1865 came into force, and that questions affecting the construction of that will, or the regulation of a succession under it, must be determined by principles of natural justice, or "according to justice, equity and good conscience." In other words, the will was to be construed according to the intention of the testator, and it was held by the Privy Council that Thomas Brown Skinner took only a life interest.

In every case it is purely a question of construction of each particular instrument, and the real basis of construction of the portion of the clause in dispute in this case is to ascertain the intention of the testator in adding to the name of the legatee the words, "and (his) sons and

3. Mahomed Syedol Ariffin v. Yeoh Ooi Gark, 1916 P C 242=39 I C 401=43 I A 256 (P C).
4. Durga Priya Chowdhury v. Durga Pada Roy, 1928 Cal 204=109 I C 752=55 Cal 154.
5. Krishnarao Ramchandra v. Benabai, (1896) 20 Bom 571.
6. Skinner v. Naunihal Singh, (1913) 35 All 211=19 I C 267=40 I A 105 (P C).

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daughter" (or daughters) in the legacy. It is always the intention of the testator as expressed or implied in the language of the will which must be given effect to so far and as nearly as may be done consistently with the law. That intention must be collected with reasonable certainty, and it may be collected from the entire clause or, if necessary, from the whole will itself. The question is whether the added words were intended to be words of inheritance, so as to denote the absolute interest of Tulsidas in the sum of Rs. 10,000, or whether they were meant to refer to the sons and daughter of Tulsidas existing at the date of the will, or whether they were meant to describe his sons and daughters, as a class of persons who were to be the direct objects and recipients of the testator's bounty along with their father. It has been held that even if the words used by the testator are words of general inheritance, the context of the will together with extrinsic circumstances, if the evidence of such circumstances is properly admissible, may show that a limited interest only was meant to be given.

The construction of the will must, therefore, ultimately depend on what the testator intended his words to mean. I do not think that in the view I take it makes much difference whether the Gujarati word in the will is to be taken as meaning "daughter" or "daughters." It is quite probable that the word was used in the singular, as both Dwarkadas Kaliandas, the first legatee under the clause, and Tulsidas Keshavdas had only one daughter each at the date of the will. Dwarkadas had another daughter, but she was born nearly a year after that date. The legatee lastly mentioned in the clause is the testator's maternal aunt Parvati. She was a widow, as the Court was informed, and had only one daughter, and the same Gujarati word is also used for "daughter" in the legacy given to her. Wherever a legatee had only one son, his name is mentioned, except in the case of Parvati who had also one son but whose name does not appear. It was admitted in argument that the translation of the Gujarati word in her case should be "son," and not "sons." Whether, therefore the testator meant to refer to the existing daughter of a legatee or to refer to daughters along with sons as a class he has throughout used the same Gujarati word. Jagmohandas and Bhagwandas, the brothers of Dwarkadas, had no children at all at the date of the will, and therefore none are referred to in the legacy given to them.

It is also quite probable that the testator was using a word for "daughter" in exact relation to the existing facts. But, as I have said before it is not very material whether the word is taken in the singular or in the plural. It is the will of a Hindu, and it has been held by the Privy Council in 2 I A 7 (7) that:

> In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property.

Ordinarily, a daughter does not come in a Hindu's conception of an heir, either of himself, or of a Hindu legatee. Daughters in a Hindu family are entitled to certain rights of maintenance and residence. If therefore a Hindu testator mentions the daughter or daughters along with the sons of a legatee in connexion with the legacy, the Court can infer that the testator intends that the daughter or daughters along with the sons shall take the benefit which the words of the will purport to give. I do not think that a Hindu testator, who is a layman, and presumably therefore unaware of the legal import of particular words, would use them deliberately in order to give an absolute estate to the legatee according to an artificial rule of construction taken from the English law. It was argued on behalf of defendants 3 to 6 that the Court does not as a rule impute to a testator the use of additional words without some additional purpose or without any purpose at all, and that he intended to make an absolute gift to Tulsidas more emphatic by the use of the additional words. But that in my opinion is merely an assumption which is not warranted. There is nothing in the whole will to show that the testator was capable of choosing words clearly apt by law to produce a particular disposition of property in favour of a legatee. Moreover, under S. 95, Succession Act, an absolute estate can be conferred on a legatee without any words of limitation at all. I do not think that the testator who drafted his own will had

7. Mahomed Shumsool v. Shewkhram, (1874) 2 I A 7 (P C).

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any particular legal principle in view on which he based his words. He based them on the facts relating to the family of each legatee, and it will correspond more nearly with his intention if the Court adopts a construction which benefits not only Tulsidas but his children as well, and confers a benefit on them jointly.

The amounts of the different legacies may also be noted in this connexion. The testator has given Rs. 10,000 between Jugmohandas and Bhagwandas, the two brothers of Dwarkadas, as they had no children at all, whereas he has given Rs. 10,000 to Dwarkadas and his sons and daughters, just as he has given Rs. 10,000 to Tulsidas and his sons and daughters. Plaintiff's counsel argued that the testator could not have meant the whole sum of Rs. 10,000 for Dwarkadas or for Tulsidas absolutely, when he had given Rs. 10,000 to the two other brothers of Dwarkadas jointly. The amount of the legacy however is not a sure guide to the testator's intention. Much must depend on his wishes and predilections, and there is nothing before me to show whether he had regard for all those three brothers equally, or for any one of them more than for the others. Further it must be remembered that a testator's bounty is absolute, without control as to the amount of the bequest or as to his motive.

Unless it is clear to the Court that the testator intended to use the particular words under consideration in their legal and technical sense, that is, as words of inheritance, the only proper way to construe them is to take them in their plain and appropriate usual sense. In order to deprive them of such sense there must be a sufficient indication to satisfy the Court that the words were meant to be used by the testator in some other sense, and the burden of proof in such cases lies on those who attribute to those words such other sense. I am not satisfied that they were so used. Taking everything into consideration I hold that the sons and daughters of Tulsidas took beneficially with him, and that the legacy was meant for parent and issue concurrently. It is provided under S. 106, Succession Act, that where a legacy is given to two persons jointly, and one of the joint legatees dies before the testator, the surviving legatee takes the whole legacy. In my opinion therefore the plaintiffs as the survivors in a legacy to Tulsidas and his sons and daughters jointly are entitled to the legacy of Rs. 10,000. There is no dispute between the parties that if the legacy is payable, interest is to run on Rs 10,000 at six per cent per annum from 10th May 1931, till payment, that is, from the expiry of a year after the date of the testator's death.

Costs of plaintiffs and defendants 3 to 6 to come out of the estate of Putlibai, Putlibai having taken the residue of the estate of Runchhoddas Modi under the consent decree in Suit No. 1889 of 1930, those of defendants 3 to 6 when taxed as between attorney and client.

D.S./R.K. *Order accordingly.*

END

End

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